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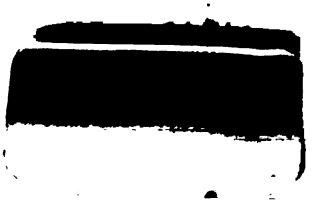

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The Workmen's Compensation Law Journal

Reports of All Decisions Rendered in Compensatic and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts

William Otis Badger, Jr., Editor
R. M. Chandor, Manager

Volume III

New York
Published by C. C. Hine's Sons Co.
100 William Street
1919

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REPRINT IN TAIWAN

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The Workmen's Compensation Law Journal

Volume III *January, 1919* *No. 1*

Reports of All Decisions Rendered in Compensation and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts.

UNITED STATES CIRCUIT COURT OF APPEALS.

FIRST CIRCUIT.

BAY STATE ST. RY. CO.

v.

RUST. (No. 1349.)*

MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT.

Under Rhode Island Workmen's Compensation Act. § 1. providing that it shall not be a defense "that the employee has assumed the risk of the injury," it is immaterial whether the risk was assumed by acts of the employee or by his contract of employment.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Action at law by Cecelia Rust against the Bay State Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William R. Harvey, of Newport, R. I. (Sheffield & Harvey, of Newport, R. I., on the brief), for plaintiff in error.

Everett L. Walling, of Providence, R. I., for defendant in error.

Before Bingham and Johnson, Circuit Judges, and Hale, District Judge.

HALE, District Judge. The plaintiff below recovered judgment against the defendant, under the Rhode Island Employers' Liability Act (section 14, c. 283. of the General Laws of Rhode Island 1909), as supplemented by the Rhode Island Workmen's Compensation Act (chapter 831 of the Public Laws of 1912), for the death of her husband, Harold H. Rust, on December 11, 1916, alleged to have been caused by the negligence of the defendant, while in its employ as a lineman, engaged in renewing wires on one of its poles in Newport, R. I.

The railroad had not accepted the Workmen's Compensation Act. Section 1 of that act provides as follows:

"In an action to recover damages for personal injury sustained by accident by an employee arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense: (a) That the employee was negligent; (b) that the

* Decision rendered, June 21. 1918. 253 Fed. Rep. 43.

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injury was caused by the negligence of a fellow employee; (c) that the employee has assumed the risk of the injury."

The railroad contends that, although the above statute applied, and deprived it of the defense that Rust "had assumed the risk of the injury," still, under its general denial, it is entitled to rely upon a contractual assumption of the risk by him, as opposed to a voluntary assumption of the risk; that, upon the evidence, it appears that he contractually assumed the risk of the dangers which caused his death; and that, at the end of the testimony, the District Court should have directed a verdict for the defendant. This question is raised by the assignment of error.

The issue brought before the court below was the question of defendant's negligence. The plaintiff stated a case of negligence. In the several counts, which we need not recite in detail, it was alleged by the plaintiff in substance: That on December 11, 1916, Rust was a lineman on the defendant's electric railway in Newport, engaged in renewing wires; that the defendant failed to meet its duty of providing him with a reasonably safe place to work; that it set him to work in close proximity with electrical appliances and instrumentalities which were not reasonably safe and suitable; or, if safe and suitable under some circumstances, on the morning in question they were not safely and suitably insulated so as to protect the lineman from dangers of which he was ignorant and of which he was not warned; that the defendant was negligent, in that it failed to insulate dangerous terminals while Rust was working on the top of the pole near such terminals, and in failing to warn him of the dangerous condition of the various terminals. The issue of fact at the trial was the question of defendant's negligence. The plaintiff offered testimony tending to show that Rust was ordered upon a pole by the defendant's foreman, to renew certain wires; that there was on the pole a pothead which was the direct cause of his death; that this pothead was attached by a bracket projecting outward from the second cross-arm; that the pothead was a device for attaching overhead wires to certain other wires which came up the side of the pole inside a lead cable; that these latter wires were not attached to the overhead wires, but were connected in a manhole in the sidewalk to an underground cable which carried a high voltage and was dangerous to human life; that, when not so arranged, these wires did not indicate electrical dangers. There was testimony tending to show that Rust did not have knowledge of certain dangerous conditions to which he was exposed and was not warned. There was also testimony that the potheads were not of a reasonably safe and suitable construction; that they were not properly insulated; and that it was not proper construction to allow exposed contacts to remain with high voltage current running through them, without some means, in the nature of a warning sign, to indicate that they were alive.

The defendant offered testimony to show that the potheads were of the best kind known to the art, that they were properly insulated, that they were kept in a reasonably safe and suitable condition. and that there was some warning given. On the question of negligence there was conflicting evidence. The railroad contends that there was conclusive evidence that its electrical system was of approved construction; that the conditions confronting Rust at the time of the injury presented obvious dangers, which should have become apparent to the lineman by the reasonable exercise of his faculties; that, by his agreement, he contractually assumed the risks from which he suffered injury and death; that the provisions of the Workmen's Compensation Act do not apply, so far as they relate to the taking away of this assumption of risk as a defense, inasmuch as his contract of employment necessarily required him to work around obviously dangerous apparatus; and that defendant is entitled to rely upon this fact under its general denial.

The courts undoubtedly recognize two ways by which an employee

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may assume the risk of the dangers arising in the course of his employment. He may assume a risk by his own acts. He may also assume a risk which is well stated in Tuttle v. Milwaukee Railway, 122 U. S. 189, 195, 7 Sup. Ct. 1166, 30 L. Ed. 1114, in which case Judge Cooley is referred to as saying that. when an employee engages in his employment, he does so in view of all the incidental hazards of the business when reasonably conducted, and that he and his employer, when fixing the terms and agreeing upon the compensation, must have contemplated these hazards as having an immediate bearing upon their agreement; that the employee well knows that he will be exposed to an incidental risk; and that he must be supposed to have contracted that, as between himself and the master, he would run this risk.

In passing the Workmen's Compensation Act. the Rhode Island Legislature was dealing with a matter of public interest, for the protection of a great class of our citizens. Its legislation should not receive a narrow construction. The Legislature used the plain, broad language that in an action to recover damages for personal injuries sustained by accident by an employee, in the course of his employment, it shall not be a defense "that the employee assumed the risk of the injury." The Legislature had before it the well-known condition that there are the two ways which we have mentioned by which an employee may assume the risk of injury; namely. by his acts and by his agreements. Nothing is brought to our attention which tends to the conclusion that the Legislature intended to exclude one way of assuming risk. and to permit another. Nothing before us leads to the inference that the Legislature did not intend to exclude the entire matter of assumed risk, regardless of classifications as to the different ways by which a risk may be assumed. The Legislature may well have had in mind. also, that the master's liability depends upon negligence; and that evidence of negligence is often directed to what an employee is doing under his agreement of service. And it is sometimes of little practical importance whether it be found that a certain risk is assumed, or that, under the contractual relations existing between the master and the servant, no negligence is found on the part of the master. This is illustrated in Ashton v. Boston & Maine Railroad, 222 Mass. 65. 109 N. E. 820, L. R. A. 1916B. 1281, which case is relied on by the defendant. In that case, the Massachusetts court had before it a condition in which the plaintiff's intestate was a foreman in the defendant's employ; he was skilled in electrical matters; he was under the duty of seeing whether the electric wires and appliances within the electric zone were in repair, and to maintain and keep them in repair. When injured. Ashton was in the performance of this duty. In doing it he was killed. The court found that the record did not disclose any evidence of negligence on the part of the defendant. That was the decision of the case. What the court said further. beyond deciding the case, it is not necessary for us to consider. It is clear that if dangers ordinarily incident to a business, when properly conducted. are contractually assumed or, standing alone, are not evidence upon which a finding of negligence on the part of an employer could be predicated, we are not concerned with such a case.

In the case at bar nothing happened like the facts in the Ashton Case. Rust was a lineman; he was not a hunter for electrical trouble; he was under no duty to discover whether electrical appliances and instrumentalities were out of repair, and, if so. to repair them; he did not go upon the pole to see whether the pothead needed to be repaired or needed any further insulation; he was there to do his duty as a lineman in renewing wires on defendant's poles; and his injury was not due to a danger incident to the business in which he was engaged. when such business was reasonably conducted. There was evidence tending to show that he met his death by reason of the failure of the railroad to exercise the care of a reasonably prudent man in providing suitable electrical

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appliances and instrumentalities, in keeping them properly insulated. and in sufficiently warning its employee. There was evidence, also, to the contrary. All this evidence was given to the jury under proper instructions by the court below. We find no error in the action of the District Court in such submission of the case to the jury. and in refusing to direct a verdict for the defendant.

The judgment of the District Court is affirmed. with interest; the defendant in error recovers her costs in this court.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

ATLANTIC COAST LINE R. CO.

v.

WOODS. (No. 1567.)*

1. COMMERCE — FEDERAL EMPLOYERS' LIABILITY ACT — SUFFICIENCY OF EVIDENCE.

In a railroad employee's action for injuries under the Employers' Liability Act, evidence *held* to show that the bolt upon which plaintiff was working when injured was put on a particular engine, engaged in interstate commerce.

(For other cases, see Commerce, Dec. Dig. § 27[8].)

2. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—INJURY IN "INTERSTATE COMMERCE."

An engine regularly hauling interstate passenger trains was used in interstate commerce when taken out of a train in order that a bolt might be repaired, being placed in the shop and sent out upon the same day on its regular run, and the railroad's employee, injured in doing the work, was injured while employed in interstate commerce.

(For other cases, see Commerce, Dec. Dig. § 27[8].)

(For other definitions. see Words and Phrases. First and Second Series, Interstate Commerce.)

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Action at law by Robert A. Woods, by his guardian ad litem, against the Atlantic Coast Line Railroad Company. To review judgment for plaintiff, defendant brings error. Reversed.

See, also, 238 Fed. 917. 151 C. C. A. 651.

Lucien W. McLemore, of Sumter, S. C. (Douglas McKay, of Columbia. S. C., and P. A. Willcox, of Florence, S. C., on the brief), for plaintiff in error.

W. Boyd Evans and W. W. Hawes. both of Columbia, S. C., for defendant in error.

* Decision rendered, May 7, 1918. 252 Fed. Rep. 428.

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Before Pritchard, Knapp, and Woods, Circuit Judges.

PRITCHARD, Circuit Judge. This case comes here on writ of error from the District Court of the United States for the Eastern District of South Carolina. The plaintiff in error will be referred to as defendant, and the defendant in error as plaintiff; such being the relative positions of the parties in the court below.

Plaintiff, while in the employ of the defendant company at its machine shops at Florence, S. C., operating a machine used to cut threads or bolts, sustained an injury resulting in a broken wrist. This action was brought to recover damages for defendant's alleged negligence as the proximate cause of such injury. It was tried at the March term of the Florence court, 1916. resulting in a judgment for plaintiff in the sum of $2,000, and was heard on a writ of error by this court at the November term, 1916. The judgment of the court below was reversed, and the case remanded for a new trial, on account of the refusal of the District Court to admit evidence in support of defendant's contention that the parties were engaged in interstate commerce at the time of the injury, and hence that the action should be controlled by what is known as the "Employers' Liability Act." Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1916, §§ 8657-8665). The second trial resulted in a verdict for plaintiff of $800, upon which a judgment was entered.

It is insisted that the court below erred in refusing to direct a verdict for defendant at the close of all the evidence upon the ground that the action is controlled by act of Congress known as the "Employers' Liability Act," and. not having been brought within two years, was barred by section 6 of the act (section 8662). Two questions were submitted to the jury in the court below, to wit: (1) Was the U-bolt which was being prepared by plaintiff at the time he was injured put on engine No. 88? and (2) was this engine engaged in interstate commerce?

Defendant introduced several witnesses, who testified as to this transaction. However, we think the testimony of the witness Carter, defendant's assistant roundhouse foreman at Florence, is more to the point than that of the others. He testified in part as follows:

"Q. Did you or not know that there was a U-bolt to be threaded that morning? A. Yes, sir; by my orders there was one sent in there for 88. Q. Who was to thread it? A. The Woods boy; the man running the bolt cutter. Q. Robert Woods? A. Yes, sir. Q. What engine was that bolt to be used for? A. Engine 88. Q. How do you know it was for engine 88? A. Because I had it taken off engine 88 myself that morning. Q. When did you first know it was necessary to make the U-bolt for engine. 88? A. Three days previous to this day * * * Q. How did you happen to know three days before this boy was hurt, that the U-bolt was needed on engine 88? A. Engine inspector report to me— Q. Don't state what the engine inspector said; did you see it that day? A. I saw it the morning it came in. Q. Morning of what day with reference to Wood's injury? A. That was the day he was injured. Q. When did you see it coming in? A. I saw it when it pulled in from Columbia. Q. What train? A. 54. Q. What is 54? A. Passenger train. Q. Running between what points? A. Wilmington and Columbia. Q. Was the engine taken off of that train that morning? A. Yes, sir; engine went out that night on 55. Q. What train is that? A. That is a train from Wilmington to Columbia."

Cross-examination:

"Q. You say you knew three days beforehand that this yoke had to be fixed? A. Yes, sir. Q. How did you say you knew it? A. Our engine inspector reported to me late in the afternoon. * * * Q. What was it he reported to you? A. The yoke broke, the rest here, and there is a key holding it up, and this was broken off flush with this. (Witness

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was illustrating with yoke used on trial.) Q. Do you know what time young Woods got hurt? A. No; I was not in there at the time. Bultman came to me about 11 or 11:30, and told me that the boy cutting that yoke for engine 88 had broke his arm. Q. Were you present and saw this yoke put on? A. I saw him finishing up the job. Q. Were you present and saw this yoke put on the engine? A. I saw him finishing up the job; I can swear he put that on 88. Q. You were there while he was putting it on? A. Yes, sir; while he was finishing it up."

Also witness Koopman was introduced by defendant and testified as follows:

"After yoke was repaired by Mr. Wade I threaded it. Accident was about 9 o'clock in the morning; am not sure, it was some time in the morning. The yoke threaded by me was the same one taken out of the machine after the accident to plaintiff and repaired by J. J. Wade. After Robert Woods was injured, I took charge of bolt cutting machine. I threaded the one Woods was working on. No other yoke was threaded that day. I was employed on the bolt cutter from time plaintiff was injured until he came back to work."

[1, 2] The court below submitted the question to the jury as to whether the engine on which this U-bolt was used was engaged in interstate commerce. Upon this point the defendant's evidence clearly establishes the fact that the bolt in question was put on engine 88. Indeed, plaintiff offered no evidence to the contrary. Therefore the next question is as to whether this particular engine was being used in interstate commerce. This point has been passed upon in many instances.

In the case of Norfolk & Western Railway Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172, it appears that an employee was injured while piloting a locomotive (by walking ahead of it) through the railroad yard to a point where the locomotive was to be attached to an interstate train to assist in moving it up a grade to the next station. The court in that case held that the employee was engaged in interstate commerce. However, in this instance it cannot be said that the employee was directly engaged in interstate commerce. Nevertheless he was performing work which was necessary to the preparation of the engine which had been and was to be used in such commerce.

In the case of Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, the plaintiff was injured while a dining car was standing on the siding between the time when it was taken out of an interstate train and placed there and the time when it was removed by another interstate train on the return trip. The third syllabus in that case is in the following language:

"A dining car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the next trip."

Also in the case of Northern Pacific Railway Company v. Maerkl. 198 Fed. 1, 117 C. C. A. 237, the Circuit Court of Appeals for the Ninth Circuit passed upon a question analogous to one here presented. The first syllabus in that case reads as follows:

"Where an employee of defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant, when working in repair shops connected with an interstate track, engaged in repairing a car used by defendant indiscriminately in both interstate and intrastate commerce as occasion required, defendant was at the time 'engaged in interstate commerce,' and the employee was employed by defendant in such commerce, within the meaning of Employers' Liability Act April 22, 1908. c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322 [Comp. St. 1916, § 8657]), and an action for his injury or death may be maintained against defendant thereunder."

The following cases are very much in point: Bower v. Chicago, etc., R. Co., 96 Neb. 419, 148 N. W. 145; Lloyd v. Southern Ry. Co., 166

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N. C. 24, 81 S. E. 1003; Law v. Illinois Central Railway Co., 208 Fed. 869, 126 C. C A. 27, L. R. A. 1915C, 17; Southern Pacific Railroad Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916; Baltimore & Ohio Railroad Co. v. Darr, 204 Fed. 751, 124 C. C. A. 565, 47 L. R. A. (N. S.) 4.

It is true there are cases in which it has been held that where more than one inference may be drawn from the evidence, or where the facts are in dispute as to whether the parties are engaged in interstate commerce the same should be submitted to the jury. These cases are not analogous to the case at bar. As we have already stated, it is established by uncontroverted evidence that the U-bolt which was being prepared by plaintiff at the time he was injured was to be put on engine 88, which was engaged in interstate commerce. This fact is not controverted by any of the witnesses who testified at the trial.

It is insisted by counsel for plaintiff that the case of Shanks v. Delaware, Lackawanna & Western Railroad Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436. L. R. A. 1916C, 797, clearly sustains the contention of plaintiff. While the railroad company in that case was engaged in both interstate and intrastate commerce, it maintained a repair shop where locomotives engaged in such commerce were repaired. Shanks sustained the injury of which he complained while employed in the shop. It appears that his usual work consisted in repairing parts of locomotives, "but on the day of the injury he was employed solely in taking down and putting into a new location an overhead countershaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work." The Supreme Court in passing upon that case propounded the following question:

"Was the employee at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The court there held that the plaintiff was not engaged in interstate commerce. and. among other things, said:

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of coal miner in the Yurkonis Case. was too remote from interstate transportation to be practically a part of it. and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

We think the case at bar is easily distinguished from the Shanks Case. In the case of Delaware, Lackawanna & Western Railroad Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, it appears that the plaintiff was employed in a coal mine, where the coal mined was to be used in hauling interstate commerce. The Supreme Court held in that case that the plaintiff was not engaged in interstate commerce. Also in the case of Minneapolis & St. Louis Railroad Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B. 54, the Supreme Court held that the plaintiff was not engaged in interstate commerce at the time of his injury. There the engine had been employed both in intrastate and interstate commerce. The court in disposing of the case among other things, said:

"* * * It does not appear that this engine was destined especially to anything more definite than such business as it might be needed for.

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It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen."

The case at bar. as we have stated, is distinguishable from the cases relied upon by counsel for plaintiff, inasmuch as the engine was taken out of interstate commerce for the express purpose that it might be repaired to enable it to continue as an instrument of interstate commerce. In other words, it is easily distinguished from the Winters Case because the character of the work in which the engine in this instance was employed did not depend "upon remote possibilities or upon accidental later events." It appears from the evidence that engine 88 was regularly engaged in hauling interstate passenger trains, operating under a rule of the road by which it reached Florence every three days. It further appears that on the day plaintiff was injured this engine was taken out of the Columbia-Wilmington train in order that the U-bolt in question might be repaired. It also appears that the engine was placed in the shop and sent out upon the same day on its regular run, hauling what is known as the Columbia-Wilmington train.

There being no conflict of evidence as to whether the plaintiff at the time of his injury was engaged in repairing an instrumentality destined for use in interstate commerce, and it appearing that more than two years had elapsed from the date of plaintiff's injury before the commencement of this action that the same is barred by section 6 of the Employers' Liability Act, the court below erred in refusing to direct a verdict in favor of defendant.

For the reasons stated, the judgment of the lower court is reversed.

WOODS, Circuit Judge (dissenting). The plaintiff, Robert A. Woods, an employee, recovered judgment for personal injuries against Atlantic Coast Line Railroad Company for $800, on July 30, 1917. The District Judge overruled a motion made on behalf of the defendant to direct a verdict on the ground that the plaintiff was engaged in interstate commerce at the time of the injury, that more than two years had elapsed after the injury before the action was brought, and that therefore the action was barred by the statute. After refusing the motion, the District Judge submitted to the jury the question whether the injury was received while the plaintiff was employed in interstate commerce, and gave the instruction that if it was, the verdict should be for the defendant.

The sole question before us is whether the only reasonable inference to be drawn from the evidence was that the plaintiff was engaged in interstate commerce. I think it clear that the question should be answered in the negative. The plaintiff was operating a machine to thread bolts used on eccentric yokes or straps. The bolts when cut were thrown into a pile and used indiscriminately for engines drawing intrastate and interstate trains. The evidence tends so strongly to show infliction of the injuries while cutting a bolt for engine 88 that I assume that it was. This engine, on the morning of the day of the accident, January 25, 1913, had drawn the train running from Columbia, S. C., to Wilmington, N. C. In accordance with the usual custom, it was laid off at Florence, S. C., a junctional point which was the end of its run; the bolt was taken from it, repaired, and restored to the engine, which, after remaining in Florence all day, was at that place attached to a train the same evening, running from Wilmington to Columbia.

The evidence makes it clear that at the time of the accident, the engine was not actually engaged in drawing an interstate train, was not on its way to be attached to such train, and was in no way appropriated or designated as an engine used especially for interstate commerce. J. J. Wade, blacksmith in the railroad shops at Florence, testified that:

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"Engine 88 was a passenger engine, running either between Florence and Wilmington, or Florence and Columbia."

The following questions and answers appear in the testimony of T. J. Carter, assistant roundhouse foreman:

"Q. What sort of service was 88 in at that time? A. Passenger service, between Florence or Charleston, Columbia, and Wilmington. Q. And where did it come from that morning? A. Came from Columbia. Q. And stopped at Florence? A. No, sir; went to Wilmington; the engine stopped at Florence, that engine; the train went on to Wilmington 20 minutes after arrival at Florence. Q. But I am talking about the engine that this new bolt went on. A. That engine stopped at Florence. Q. That was the end of that engine's run? A. Yes, sir; end of the engine's run. Q. That engine ran between Columbia and Florence? A. Columbia, Florence and Charleston. Q. And the balance of the train was pulled on by another engine to another place? A. Yes, sir. Q. But this particular engine ran between Columbia. S. C., and Florence, S. C.? A. Yes, sir. Q. And that was the end of the engine's run when it got to Florence? A. Yes, sir. Q. Upon which this bolt you are talking about was put on? A. Yes, sir. Q. And then that engine lay there all day, did it not? A. Lay there from 8:45, about 9 o'clock. when it came into the shop, until about 5:30 in the evening, when we sent the engine out. Q. And then came back to Columbia? A. Yes, sir. Court: Q. Those are interchangeable for engines of the same class? A. Yes, sir. Q. You say the terminal points of this engine were Columbia and Florence? A. Between Charleston, Columbia, and Florence, and sometimes we used it to Wilmington; it was not any special terminal, but that is where she is supposed to run."

There was not a particle of evidence to show that when the engine was detached from the Columbia-Wilmington train. the railroad authorities had any formed intention as to the next use to be made of it. The engine was not interrupted in an interstate haul, to be repaired and continued on its trip. At the time of the repairs, it was not engaged in any business, either state or interstate. After being detached for repairs, its next work. so far as the evidence shows. might have been between Columbia and Charleston, or Wilmington and Columbia, with the probabilities in favor of the Columbia and Charleston trip, rather than the Wilmington and Columbia trip, for the testimony was that it was more often used on the intrastate trip. It was one of a class of engines interchangeable for other engines of the same class for any of these trips. In short, at the time of the accident its office as an instrumentality of interstate commerce had ceased, and it was entirely uncertain, at the time of the accident and the repair of the bolt, whether it would be next used in interstate commerce or intrastate commerce.

It is unnecessary to enter into an analysis of the many cases on the subject, and the refined distinctions necessarily made between interstate and intrastate commerce. The facts of this case bring it clearly under Minn. & St. L. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54. In that case the court says:

"The agreed statement is embraced in a few words. The plaintiff was making repairs upon an engine. This engine 'had been used in the hauling of freight trains over defendant's line, * * * which freight trains hauled both intrastate and interstate commerce, and * * * it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18th when it pulled a freight train into Marshalltown, and it was used again on October 21st, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted

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to any kind of traffic. and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa. as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

The utmost that the defendant could claim was submission to the jury of the question whether the plaintiff was employed in repairing part of the engine engaged in interstate commerce. The conclusion of the jury that it was not so engaged was well supported by the evidence above quoted.

I think the judgment should be affirmed.

SUPREME COURT OF CALIFORNIA.

SOUTHERN PAC. CO.

v.

INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8803.)*

COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE."

A member of a repair gang employed by a railroad company to make light repairs upon cars side-tracked in a yard used for interstate and intrastate commerce, killed while passing from one car to the other, was engaged in "interstate commerce" within the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[8].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

In Bank. Proceedings under the Workmen's Compensation Act by the widow and children of James Morton, deceased, to obtain compensation for decedent's death, opposed by the Southern Pacific Company, employer. Compensation was awarded by the Industrial Accident Commission, and the employer applies for a writ of review. Award annulled.

Henley C. Booth, of San Francisco, for petitioner.
Christopher M. Bradley, of San Francisco, for respondent.
Frank J. Creede, of San Francisco, for the guardian.

WILBUR, J. The petitioner seeks to review an award of the respondent Industrial Accident Commission in favor of the widow and children of James Morton, deceased, made under the terms of the Workmen's Compensation Act of California (St. 1913, p. 279). The only question here involved is whether or not the respondent has jurisdiction to make an award, or whether the liability of the petitioner is to be determined by

* Decision rendered, Sept. 30, 1918. 175 Pac. Rep. 453.

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the courts in accordance with the provisions of the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]). This depends upon whether the deceased when killed was engaged in interstate commerce.

The deceased was a member of the repair gang employed by petitioner to make light repairs upon cars side-tracked and detained upon side tracks reserved respectively for inbound or outbound freight traffic in the Bay Shore Freight Yards of petitioner. Such detention on said tracks was in part for the purpose of inspecting the cars to ascertain defects therein and to make such light repairs thereof as were thereby found necessary, in order that the cars might proceed to their destination. "Light repairs" were made upon the cars without moving them from their positions in the "cuts" or "drags" on the side tracks, but "heavy repairs" were made by cutting out said cars and transferring them to tracks specially devoted to repair work. About 40 per cent of the business of the yard at that time was interstate business, the balance intrastate.

The tracks upon which the cars repaired by the deceased and his fellow laborers were standing were part of the switching tracks in the freight yards essential to the movement of interstate as well as the intrastate commerce. The system of light repairs inaugurated in the yards in question was for the purpose of facilitating the movement of trains to and from the yard and was distinct from the heavy repair jobs which required the cars to be cut out of the "cuts" or "drags" and placed on special side tracks arranged for such repair work. During the day the light repair men doing "light repairs" would repair on an average 100 cars. Decedent's duties required him to pass from one car to another and one track to another seeking out the cars which were tagged by the inspectors as requiring light repairs and finding them to make such repairs. Decedent and his assistant had released the air on a string of cars, some containing interestate and others intrastate freight, and were proceeding across the yard for the purpose of making light repairs upon other cars. While the deceased was crossing one of the switches, he was killed by an empty freight car being suddenly moved upon him because struck by another car "kicked" upon the track by a switch engine It is not known whether the next car to be repaired by deceased would be loaded with interstate or intrastate commerce, as that would depend entirely upon which sort of a car they happened to first discover tagged for light repairs.

Whether or not deceased was engaged in interstate commerce "depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task," as was said by the Supreme Court of the United States in Erie R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319, in passing upon the case of a yard conductor injured while going to report to the yard master for further orders. "The true test," it is there held, "is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act." The deceased and his assistant would work on 25 cars daily, and in so doing move from place to place in the yards. Some cars repaired were filled with interstate and others with intrastate freight. The character of employment in which decedent was engaged seems to approach more nearly to that of a switch engineer, as a "single and indivisible task," than to that of a "heavy repair" man, whose work might be properly characterized as a "succession of separate tasks." Such an engineer was killed while leaving the carrier's yard, and it was held that he then was engaged in interstate commerce. "In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment. See North Carolina R. Co. v. Zachary, 232 U. S. 248, 269 [34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159]. Like his

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trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance." Erie R. Co. v. Winfield, 244 U. S. 170, 173, 37 Sup. Ct. 556, 557, 61 L. Ed. 1057, Ann. Cas. 1918B, 652. By the same process of reasoning the decedent, whose general employment was to repair cars containing interstate and intrastate freight in the yards of the petitioner, was employed in interstate commerce while passing through the yard from one such car to another. In considering this question it is also proper to bear in mind the requirements of the federal Safety Appliance Acts (Act Cong. March 2, 1893, c. 196, 27 Stat. 531; Act Cong. March 2, 1903, c. 976, 32 Stat. 943; Act Cong. April 14, 1910, c. 160, 36 Stat. 298 [U. S. Comp. St. 1916, §§ 8605-8615, 8617-8619, 8621-8623]) in regard to the inspection and the care of cars on railways engaged in interstate commerce. The inspection and repair service of the deceased was required by such statute and was therefore made an essential part of the movement of interstate commerce and the decedent was engaged in performing this work upon cars brought to a standstill partly for that purpose.

We conclude therefore that the deceased was engaged in interstate commerce when killed.

The award of the commisison is annulled.

We concur: Angellotti, C. J.; Melvin, J.; Shaw, J.; Sloss, J.; Lorigan, J.; Richards, Judge pro tem.

SUPREME COURT OF ILLINOIS.

CHICAGO GREAT WESTERN R. CO.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al. (No. 12074.)*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION — CASUAL EMPLOYMENT.

The character of the contract of employment, as to whether it was casual or not, was fixed by the contract of hiring.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION — BURDEN OF PROOF.

In workmen's compensation proceedings, the burden of proving the employment, and the injury, is upon claimant.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION — "CASUAL EMPLOYMENT."

A structural ironworker, who was sent from union headquarters, together with three other members, to complete a job requiring only three or

* Decision rendered, Oct. 21, 1918. 120 N. E. Rep. 508.

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four days' work, and who was employed by the railroad for the particular job only, was engaged in "casual employment" within Workmen's Compensation Act; employment being casual when workmen are employed only occasionally, irregularly, and incidentally.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensatoin Act by the Standard Trust & Savings Bank, administrator, for compensation for the death of Christ Anderson, opposed by the Chicago Great Western Railroad Company, employer. The award of the Industrial Board was affirmed by circuit court on certiorari, and the circuit judge having certified that the case was one to be heard by the Supreme Court, the employer brings error. Reversed.

Winston, Strawn & Shaw, of Chicago (Ralph M. Shaw, Charles J. McFadden, Silas H. Strawn, and John D. Black, all of Chicago, of counsel), for plaintiff in error.

Frederick A. Brown and Irving W. Baker, both of Chicago, for defendant in error.

CARTER, J. Christ Anderson filed an application with the Industrial Board on April 10, 1917, for adjustment of a claim against the plaintiff in error railroad company for injuries alleged to have been sustained by him while in the employ of that company, on March 21, 1917, by falling or being knocked from a swinging scaffold. Evidence was heard by an arbitrator, who found in favor of the applicant, and an award of damages was made. June 20, 1917, after the application was filed with the Industrial Board, Anderson died, and the Standard Trust & Savings Bank was appointed administrator, in whose name the subsequent proceedings were prosecuted. After the finding by the arbitrator, on petition for review the Industrial Board found in favor of the administrator and awarded weekly payments aggregating $3,500. The circuit court on certiorari affirmed the award of the Industrial Board, and, the circuit judge having certified that the case was one which should be heard by this court, it was brought here by writ of error.

The accident occurred near the corner of Polk and Franklin streets, in Chicago. Polk street runs east and west and crosses Franklin street at right angles by means of a viaduct. About 45 feet northwest of the viaduct is plaintiff in error's Harrison street freight house. Previous to March 21, 1917, plaintiff in error began to build a drive or runway from this viaduct to the second floor of the freight house, then under process of construction. In building this runway it was necessary that certain structural ironworkers' services be used. Regular men employed by the railroad began the work; but after a conference with the business agent of the Structural Ironworkers' Union four union men from the headquarters of said union were sent over to continue the work, Christ Anderson being one of the four, and one of them, Carmody, being put in charge of the work as foreman. This runway appears to have been a part of the general scheme for the freight house that was being built, so that the Washburn-Crosby Company could drive from Polk street to and from the second floor of the freight house with loads of flour. On the day of the accident, Anderson was working on said runway when a horse and wagon being driven beneath the viaduct by an employee of the Heco Envelope Company struck the scaffold, causing Anderson to fall 12 or 14 feet to the pavement and to receive injuries from which he died about 13 weeks after. The details of the accident or the extent of the injuries are not in dispute. The only question raised on this hearing is whether or not the employment of the deceased was casual, and therefore whether or not he

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could recover under the provisions of the Workmen's Compensation Act (Hurd's Rev. St. 1915-16, c. 48, §§ 126-152h) which was in force at the time of the accident.

The evidence tends to show that structural ironworkers are a part of the regular force of employees of various railroads; that some of these ironworkers regularly employed by plaintiff in error started to do this work, when a change was made by calling in the four workmen as above stated. The question as to whether these new men were union or non-union is, as suggested by counsel, not material; but the facts as to the change of the workmen during the construction of this runway are only important in their bearing on the character of the contract entered into between the railroad company and Christ Anderson. We judge from the evidence in the record that it is not disputed that railroads now and then call in structural ironworkers from the union headquarters to do work of this character. There is proof in the record, however, that plaintiff in error had never before called Anderson or his fellow employees to do this character of work for it. The evidence shows that Anderson had been an experienced structural ironworker for many years, and, so far as the record shows, this is the only employment he ever had from the plaintiff in error company. The particular job of doing structural ironwork on this runway lasted three or four days after the four union men came to do the work. Apparently two of the four quit before the job was completed and were paid for what work they had done, and other union men were sent from union headquarters to take their places.

[1, 2] Counsel for defendant in error argues that there is nothing to show that Anderson may not have begun a work which was to give him permanent employment with the railroad company as a structural ironworker. There is nothing in this record that in any way tends to uphold this argument. The evidence all justifies the conclusion that he was only employed for that particular job, as were the other three men who came at the same time. The work of building this runway was a part of the regular work for the conduct of the railroad's business. The putting on of these union ironworkers for this temporary work only bears on the character of the contract of employment. The character of the work was fixed by the fact that it was a part of the railroad work. The character of the contract of employment, as to whether it was casual or not, was fixed by the contract of hiring—that is, the contract could have been of such a nature that Anderson would have been a regular employee of the railroad as a structural ironworker, or it could have been of such a nature that he was only a casual employee for this particular job—and the question to be determined here is which kind of contract was, in fact, made. The fact that the man making the contract is union or non-union is wholly incidental to the question of what the real contract was. The burden of proof is upon the claimant to prove the employment and injury, but the burden is on the plaintiff in error to prove that the employment is but casual. Peoria Terminal Co. v. Industrial Board, 279 Ill. 352, 16 N. E. 651; Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627.

This court has had occasion several times to discuss the meaning of the word "casual," as used in the Workmen's Compensation Act with reference to the character of the employment. In Baer's Express Co. v. Industrial Board, 282 Ill. 44, 118 N. E. 412, a workman had been employed prior to the accident at irregular times by the express company. He had been promised regular employment and reported to work at the stables Monday morning about 6 o'clock. Three hours later he was injured in the express company's barn. The opinion says (282 Ill. 49, 118 N. E. 414):

"We are of the opinion that, giving the testimony on behalf of the claimant all the weight to which it is entitled, it is insufficient to show that there was such an employment as to render plaintiff in error liable under

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the Workmens' Compenation Act. It cannot be seriously contended but that up until the morning of the day on which he was injured the employment of the deceased by plaintiff in error was but casual. * * * The only conclusion that can be drawn from it is that the relationship between deceased and plaintiff in error had remained unchanged and that he was still but a casual or occasional employee."

In McLaughlin v. Industrial Board, 281 Ill. 100, 117 N. E. 819, a workman was injured while blasting stumps in connection with work on a highway. The opinion says (281 Ill. 108, 117 N. E. 822):

"We are of the opinion, however, that his employment was but a casual employment within the meaning of the statute. From the evidence it appears that the work of dynamiting or blasting stumps had been going on but a few hours at most, in the morning Hiler was killed, and that work necessarily could only continue for a very short time, and was to end with the blowing out of the stumps on that particular piece of road. *. * * The employment of Hiler in this case * * * was not a regular or stable employment within the meaning of the statute but was merely a casual employment."

In re Gaynor, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363, a waiter, employed by a caterer to serve at a banquet, was injured while preparing for the banquet. He had never been employed before that time by that caterer. The custom of the catering business was that such banquets were served by waiters secured for each particular occasion. The Massachusetts Supreme Court said in its opinion:

"It would be difficulty to conceive of employment more nearly casual in every respect than was that of the employee in the case at bar. The engagement was for a single day and for one occasion only. * * * The relation between the waiter and the caterer had no connection of any sort with any events in the past. Each was entirely free to make other arrangements for the future, untrammeled by any express or implied expectations of further employment. The employment was not periodic and regular. * * * It was in the course of the regular business of the employer. But under our act that is an immaterial circumstance in view of the other fact that the employment was 'but casual.' The conclusion seems irresistible that the employment of the deceased was 'but casual' within the meaning of those words in our act."

The Massachusetts act under which this opinion was construed is identical with the Illinois act so far as it relates to casual employment.

In re Cheever, 219 Mass. 244, 106 N. E. 861, was a case brought under the Workmen's Compensation Act of Massachusetts, (St. 1911, c. 751, as amended by St. 1912, c. 571). One Pierce owned a coal yard and conducted a retail coal business. At various times in 1911, 1912, and 1913 he employed Cheevers to deliver coal with Cheevers' wagon at $5 a day for himself and team, he being hired for this general work for no fixed duration of time and for no specific job. The Massachusetts Supreme Court in discussing this accident said:

"The scheme created by the Workmen's Compensation Act is a scheme of insurance in which the premiums to be paid by the employer are based upon the wages paid by him to his employees. It may have been thought impracticable to work out a scheme of insurance if persons who are only occasionally employed are to be included among those insured."

And the court held Cheevers' employment in the case was casual and therefore that he could not recover.

In Blood v. Industrial Accident Com., 30 Cal. App. 274, 157 Pac. 1140, a house painter was employed to apply two coats of paint to a certain building; the employer furnishing the material. The employment was not for any definite period of time, but the evidence showed that it would

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reasonably have been done within two weeks. During the first day the employee was accidentally injured. The California court said:

"It is noted that the ordinary signification of the word 'casual,' as shown by the lexicographers, is something which comes without regularity, and is occasional and incidental; that its meaning may be more clearly understood by referring to its antonyms, which are 'regular,' 'systematic,' 'periodic,' and 'certain.' Tested by this distinction, the contract of employment of Heck by the petitioner to paint his house was casual. It was a mere occasional and incidental contract, not constituting or connected with any regular, systematic, periodic, or certain business."

[3] While it is true, as stated by this court in Aurora Brewing Co. v. Industrial Board, 277 Ill. 142, on page 145, 115 N. E. 207, on page 208, that "each case * * * must be decided quite largely upon its special facts," cases may be valuable in the principles of law stated and in showing how those principles are applied to a certain state of facts. The Legislature certainly intended, when the act here in question was passed, to give some meaning to "casual," and we assume from a reading of the statute that it intended to give the ordinary, common meaning; that is, workmen are engaged in casual employment when they are employed only "occasionally," "irregularly" or "incidentally," as distinguishing them from those employed regularly and continuously. While it is true that the Legislature, since this accident occurred, has amended the Workmen's Compensation Act with reference to casual employment, doubtless because of the construction given by this court to the statute here under consideration in Aurora Brewing Co. v. Industrial Board, supra, still we must construe the statute in accordance with its spirit and intent and as worded when this accident occurred. In view of the reasoning of this court in the cases already cited and the other decisions mentioned, in our judgment it must be held that Anderson's employment was but casual, and that therefore there can be no recovery under the Workmen's Compensation Act.

The Industrial Board erred in holding that recovery could be had under the Workmen's Compensation Act for the injury to the deceased, as did also the circuit court. The judgment of the circuit court is therefore reversed.

Judgment reversed.

SUPREME COURT OF ILLINOIS.

N. K. FAIRBANK CO.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al. (No. 11830.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"OUT OF AND IN THE COURSE OF HIS EMPLOYMENT."

It being a custom that where deceased, sent to procure sample of fat for his employer, could not finish his inspection and return to plant of employer before 6 p. m., he would bring samples the following morning, injuries received by deceased while going home after 7:15 p. m., at which time he left the plant of another company after procuring samples, did

* Decision rendered, Oct. 21, 1918. 120 N. E. Rep. 457.

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not arise "out of and in the course of his employment," within Workmen's Compensation Act, whether or not he was carrying samples when injured.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"COURSE OF THE EMPLOYMENT."

An injury occurs in the "course of the employment," within Workmen's Compensation Act, when it occurs within the period of the employment, at a place where the employee may reasonably be, and while he is rasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings before the Industrial Commission by Rose A. McGuire, administratrix, for compensation for the death of Michael McGuire, employee. To review a judgment of the circuit court, confirming a decision and award of the Industrial Commission, the N. K. Fairbank Company, employer, brings error. Reversed and remanded.

Brode B. Davis, of Chicago, for plaintiff in erorr.

Ditchburne & Westberg, of Chicago, for defendant in error.

COOKE, J. This is a writ of error to review the judgment of the circuit court of Cook county confirming the decision and award of the Industrial Board. Claim was made by Rose McGuire, as administratrix, for compensation for the death of Michael McGuire, which resulted from an injury received by him on September 21, 1915, and which it is alleged arose out of and in the course of his employment with the N. K. Fairbank Company, plaintiff in error.

[1] At the time of his death the deceased was in the employ of the plaintiff in error as weigher and receiver in its plant at Wentworth avenue and Eighteenth street, in the city of Chicago. In the performance of his duties he was occasionally required to visit the plants of others than plaintiff in error for the purpose of inspecting fats offered for sale to the plaintiff in error and obtaining samples of the same. The factory of plaintiff in error, where the deceased performed his work as weigher and receiver, closed at 6 o'clock p. m. On the day on which he was injured the deceased was sent to the plant of Darling & Co., in Chicago, to procure samples of fat. It was his custom on such occasions, if he could obtain the samples in time, to return to the plant of the plaintiff in error before 6 oclock p. m.; but, if he could not finish his inspection and obtain the samples in time to return to the plant before closing time, he would bring the samples to the plant of plaintiff in error the following morning. On the day of the accident the deceased completed his inspection of the samples and left the plant of Darling & Co. about 7:15 or 7:20 o'clock p. m., carrying a small pail containing tallow with him. After leaving the plant of Darling & Co. he walked about two blocks to the corner of Forty-Second street and Ashland avenue, where he was struck and killed by a street car about 7:40 or 7:45 o'clock p. m. He was seen by several witnesses between the time he left the plant of Darling & Co. and the time when he was struck by the street car, and an effort was made on the part of plaintiff in error to show that at the time he was struck by the street car he did not have in his possession the pail of tallow which he took with him when he left the plant of Darling & Co. In our view of the case it is immaterial whether or not he had left the pail of tallow with some friend in that locality until he should return

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for it on the following morning, or whether he still had it in his possession at the time he was killed. The deceased had finished his work for the day and was on his way to his home at the time this accident occurred, and the sole question for our determination is whether the accident arose out of and in the course of his employment.

The Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) is designed to protect workmen and compensate them for injuries received while performing any duty necessary to be performed in the course of their employment or incident to it. It was not intended by this act that the employer who comes within the provisions of the act shall be the insurer of the safety of his employee at all times during the period of the employment. The employer is liable for compensation only for an injury which occurs to the employee while performing some act for the employer in the course of his employment or incidental to it. When work for the day has ended, and the employee has left the premises of his employer to go to his home, the liability of the employer ceases, unless after leaving the plant of the employer the employee is incidentally performing some act for the employer under his contract of employment. It is true, in Friebel v. Chicago City Railway Co., 280 Ill. 76, 117 N. E. 467, we said that, where one is injured while merely going to or returning from his employment, the injury is considered to have occurred within the line of the employment. This language was not necessary to a decision of that case and should be modified. There may be circumstances under which an employee, in going to and returning from the place of his employment, would be held to be in the line of his employment; but those cases would be governed and controlled by their own particular circumstances. In this case there is no circumstance to show that after the deceased had left the plant of Darling & Co. he was performing any mission for his employer. He had completed his work for the day. It is true that he had in his possession a small pail of tallow which it was necessary for him to deliver at the plant of plaintiff in error the next morning; but if he still retained possession of this pail at the time he was injured he did so for his own convenience, and that fact did not contribute in any way to his injury.

[2] An injury occurs in the course of the employment, within the meaning of the Workmen's Compensation Act, when it occurs within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of this employment, or is engaged in doing something incidental to it. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764. At the time the deceased was injured his duties for the day had ceased and he was on his way to his home. He was not doing anything incidental to his employment, and the applicant is not entitled to compensation for his death.

It was also contended that the injury to the deceased was the result of a risk to which the deceased was exposed equally with the general public. In the view we have taken it is not necessary to determine that question.

The circuit court erred in not setting aside the decision and award of the Industrial Board.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

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SUPREME COURT OF ILLINOIS.

FRIEDMAN MFG. CO.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al.
(Nos. 11911, 11912.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DECISION OF INDUSTRIAL BOARD—REVIEW—TIME.

Where notice and copy of decision of Industrial Board, allowing compensation for death of employee, were sent and received by employer on a certain day, and no writ of certiorari was sued out or suit in chancery commenced within 20 days thereafter, decision of board became, in view of Workmen's Compensation Act, § 19, conclusive except for fraud, although 20 days had not expired since denial of employer's petition for modification of findings of fact.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

2. MASTER AND SERVANT—INDUSTRIAL BOARD—JURISDICTION—INJURIES OUTSIDE OF THE STATE.

Industrial Board obtained jurisdiction by application of wife alleging employment of her husband and injury causing his death suffered in course of employment, although injury occurred while employee was outside of the state.

(For other cases. see Master and Servant, Dec. Dig. § 369.)

3. MASTER AND SERVANT—DECISION OF INDUSTRIAL BOARD—REVIEW.

Whether wife of deceased employee was entitled to award for injuries resulting in death which occurred outside of the state involved a construction of Workmen's Compensation Act, and if construction given by Industrial Board was erroneous, section 19 permitted a review.

(For other cases. see Master and Servant, Dec. Dig. § 417[3¼].)

4. MASTER AND SERVANT—DECISION OF INDUSTRIAL BOARD—REVIEW.

On application to circuit court for judgment for award and attorney's fees in accordance with statute, court has no jurisdiction to review decision of Industrial Board, construe the statute, or determine whether decision is correct.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY.

There is no constitutional objection to statute providing for attorney's fees, where employer does not institute proceedings for review of decision of Industrial Board and refuses to pay compensation.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

6. MASTER AND SERVANT—FAILURE TO PAY AWARD—ATTORNEY'S FEES.

Where employer failed to pay compensation according to award, and did not institute proceedings for review within 20 days, as provided by

* Decision rendered, Oct. 21, 1918. 120 N. E. Rep. 460.

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Workmen's Compensation Act, § 19, circuit court, on claimant's application for judgment for award. properly allowed attorney's fees.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Error to Circuit Court, Cook County; Oscar M. Torrison. Judge.

Application by Lydia Goodrode, administratrix of the estate of her deceased husband, Melvin Goodrode, for compensation for his death, arising out of and in the course of his employment with the Friedman Manufacturing Company, employer. The application was heard by an arbitrator, who entered an award for claimant, which was affirmed by the Industrial Board. The employer sued out a writ of certiorari from the circuit court, which dismissed writ and certified that the cause was one proper to be reviewed by the Supreme Court, and a writ of error was sued out of the Supreme Court in pursuance of that certificate. Thereafter the employer having failed to pay compensation, applicant applied to the circuit court for judgment for award, which was granted. The circuit court also certified that the cause was one proper to be reviewed by the Supreme Court, and, a writ of error being sued out, the two causes were consolidated. Judgments affirmed.

Charles J. Faulkner, Jr., and Walter C. Kirk, both of Chicago, for plaintiff in error.

MacChesney, Becker, Angerstein & Rollo and Martin C. Koebel, all of Chicago, for defendant in error.

CARTWRIGHT, J. Lydia Goodrode, administratrix of the estate of her deceased husband, Melvin Goodrode, applied to the Industrial Board for compensation for his death arising out of and in the course of his employment by the plaintiff in error, the Friedman Manufacturing Company. The application was heard by an arbitrator, who entered an award on August 22, 1916. The Industrial Board sent by registered mail to the plaintiff in error a notice of the filing of the decision of the arbitrator and a copy of the award. The letter was receipted for in the name of the Friedman Manufacturing Company. by Mr. Lynch, assistant cashier. In pursuance of that notice so received by the plaintiff in error it petitioned for a review of the award, and a hearing was had before the board, which rendered a decision on June 20, 1917, affirming the award. On June 22, 1917, the board sent by registered mail to the plaintiff in error a copy of the decision and a notice of the time when it was filed, and the letter was receipted for in the same manner and by the same officer as before. On September 17, 1917, the plaintiff in error presented to the Industrial Board a petition for a modification of the finding of facts made in the decision. With the petition for a modification of the finding was presented an affidavit of the attorney for the plaintiff in error that the agent who received the notice and copy of the decision did not know what it was and held the decision on his desk without communicating to the attorney, who knew nothing about it until September 15, 1917. The board refused to modify the finding and gave notice of its decision on September 26, 1917. Within 20 days after the refusal of the board to modify its finding the plaintiff in error sued out a writ of certiorari from the circuit court of Cook county to review the decision of the board. The court quashed the writ of certiorari and dismissed it, and certified that the cause was one proper to be reviewed by this court. A writ of error was sued out of this court in pursuance of that certificate.

The plaintiff in error having failed to pay compensation according to the award, Lydia Goodrode presented to the circuit court of Cook county her application for judgment for the award and attorney's fees in accordance with the statute. The application was resisted on the ground that the court was without jurisdiction to render any judgment, because

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the injury and death occurred outside the state of Illinois, and because certiorari proceedings were pending to review the record of the Industrial Board. It was stipulated that, if the applicant was entitled to attorney's fees at all, she was entitled to $400. The court held that pendency of certiorari proceedings was no defense, because the statutory period for instituting such proceedings had long since elapsed, and entered judgment on the award, with $400 attorney's fees. The court also certified that the cause was one proper to be reviewed by this court, and, a writ of error having been sued out, the two causes were consolidated by the court.

[1] Section 19 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 144) provides that a decision of the Industrial Board shall, in the absence of fraud, be conclusive unless a party in interest shall, by writ of certiorari to the Industrial Board or suit in chancery commenced within 20 days after the receipt of notice of the decision of the board, obtain a review of the decision. Notice and a copy of the decision of the board were sent to and received by the plaintiff in error on June 22, 1917, and no writ of certiorari was sued out or suit in chancery commenced within 20 days thereafter. The decision of the board became conclusive except for fraud. Melvin Goodrode was dead, and no condition did or could arise by which a change of the award could be made under the statute, and it was not alleged that there was any such change, but the application was for a rehearing. Such an application could not operate to nullify or set aside the limitation of time set by the statute for a judicial review. The rule was declared in Vickers v. Tyndall, 168 Ill. 616, 48 N. E. 214, where a petition for rehearing was provided for, and in cases under the Workmen's Compensation Act there is no provision for such an application.

[2-4] Goodrode was traveling as a salesman for the plaintiff in error and went to different places in the state of Illinois, but at the time of the accident had gone across the line to Gary, Ind. The Industrial Board in its decision found that while driving along an avenue in Gary his automobile went down an embankment into a pond of water, by means of which he and two other persons were caught under the car and drowned. The application for judgment was resisted upon the ground that the board had no jurisdiction, because the injury causing death occurred outside of this state, and, not having jurisdiction of the subject-matter, the award was a nullity, which could be resisted collaterally at any time or place. Jurisdiction of the subject-matter of the controversy is conferred by law, and the statute gave to the Industrial Board jurisdiction of all claims for accidental injuries or death arising out of and in the course of employment. The board obtained jurisdiction of the particular case by the application of Lydia Goodrode alleging the employment of her husband by the plaintiff in error and the injury causing his death, suffered in the course of the employment. The question whether she was entitled to an award for an accidental injury resulting in death which occurred outside of the state involved a construction of the Workmen's Compensation Act, and if the construction given to the act was erroneous, the statute permitted a review by writ of certiorari or proceeding in chancery to be instituted within 20 days. The way was open to the plaintiff in error to have a review of the construction given to the Workmen's Compensation Act by the Industrial Board, either by writ of certiorari or suit in chancery, and it did not avail itself of the privilege. The statute does not in terms limit the right to an award to accidental injuries occurring in this state, and whether the right is so limited must depend upon the construction of the various provisions of the act. The judgment entered by the court is in the nature of an execution of the award to the end that adequate means may be provided for its enforcement, and on such an application the court has no jurisdiction to review the decision, construe the statute, or determine whether the decision of the board was correct or not.

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[5, 6] The statute provides for attorney's fees where the employer does not institute proceedings for a review and refuses to pay compensation. McMurray v. Peabody Coal Co., 281 Ill. 218, 118 N. E. 29. There is no constitutional objection to such a statute and the facts authorized the allowance. The purpose of the statute is to provide a speedy method for the adjustment of compensation and the payment of the same, without the delays of litigation and the burden of expense and attorney's fees otherwise imposed upon claimants.

The judgments are affirmed.

Judgments affirmed.

SUPREME COURT OF ILLINOIS.

MEREDOSIA LEVEE & DRAINAGE DIST.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al. (No. 12093.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RELATION OF PARTIES.

The principal test as to whether one is an employee or an independent contractor lies in the degree of control retained and exercised by the person for whom the work is being done.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RELATION OF PARTIES.

Where employer drainage district supervised a ditch-cleaning operation as to results only, while the person injured operated his own machinery, furnished his own supplies, employed his own workmen, and directed the manner of work for a per diem compensation, the latter was an independent contractor, not a servant.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INDEPENDENT CONTRACTORS.

An independent contractor is not entitled to compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Error to Circuit Court, Bureau County; Joe A. Davis, Judge.

Proceeding by Clarence Glenn Renner to recover compensation for personal injuries under the Workmen's Compensation Act, opposed by the Meredosia Levee & Drainage District, the employer. From a judgment of the circuit court, confirming an award made by the Industrial Commission, the employer brings error. Reversed and remanded.

Ralph Rosen and H. L. Howard, both of Chicago, for plaintiff in error.

Charles C. McMahon, of Fulton, for defendant in error.

* Decision rendered, Oct. 21, 1918. 120 N. E. Rep. 516.

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COOKE, J. The circuit court of Bureau county rendered a judgment confirming the award made by the Industrial Board to Clarence Glenn Renner, defendant in error, of $12 per week for a period of 13 weeks for a temporary total disability, and $12 per week for a period of 80 weeks for loss of the thumb and ring finger of the right hand, as a result of injuries sustained September 28, 1916. This writ of error has been sued out to review the judgment of the circuit court.

Defendant in error and his father for a number of years prior to September 28, 1916, were the owners of a dredging machine, which they used and operated for various persons in different districts in digging and cleaning out ditches and doing similar work. They completed a contract with the Meredosia Levee & Drainage District on August 17, 1916. At that time the father retired from the business and defendant in error took it over. During the latter part of that month the ditch, which the father and son had just completed, became clogged and filled with sand and dirt, due to local floods, and the commissioners of the drainage district, desiring to have the sand and dirt removed, negotiated with defendant in error for the use of his dredging machine and his helpers in removing the same. Defendant in error contracted with the drainage district to do this work for $2.50 per hour, or $25 per day of 10 hours. No agreement was made as to the number of yards of earth to be removed, or that the work was to be done in a specified time. Defendant in error was to be paid for the use of his dredging machine, for his own time and the time of two helpers, at the rate of $25 per day, and he was to furnish gasoline for the engine and whatever else was necessary to properly do the work. He began working under this contract on August 30, 1916. There were no written specifications as to how the work was to be done, but, under the direction of the commissioners, Andrew Dolan, one of the commissioners for the district, was present to watch and inspect the work being done, and to see that it was done as the district desired, to tell defendant in error and his men where the work was to commence and where it was to end, how deep it was to be dug, and where the earth was to be deposited on the spoil banks. Dolan had the right to discharge defendant in error, or either of his helpers, if the work was not being done as the district desired, or, as one of the commissioners stated in his testimony "if they were laying down on the job." For his supervision Dolan was paid by the district $3 per day.

Defendant in error was paid at the rate of $25 per day, by checks payable to himself, at the end of each week, and out of this he bought the gasoline, and paid all incidental expenses included in the operation of his dredging machine, and paid his men according to his own arrangement with them. Defendant in error was an expert and competent man in the dredging business, and had been a dredging contractor for some time. It does not appear from the record that Dolan ever gave any directions as to how the work should be done. The evidence discloses that he simply designated where the work was to start, how deep the earth was to be excavated from the bottom of the ditch, in order to bring it down to the original grade, and how far back the earth was to be deposited on the spoil banks. On September 28, 1916, defendant in error, while operating the dredging machine, sustained the injury for which he was awarded compensation by the Industrial Board. Thereafter he was unable to perform any further work on this contract with the drainage district. This machine and the men in his employ, however, continued the work, and completed it about a month later. Up until the time of the hearing before the Industrial Board defendant in error had not recovered sufficiently from his injury to be able to do any work.

[1, 2] It is contended on behalf of the drainage district that defendant in error was not an employee, but was an independent contractor, and not within the scope of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). The principal test as to whether one is an em-

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ployee or an independent contractor lies in the degree of control retained and exercised by the person for whom the work is being done. Decatur Railway Co. v. Industrial Board, 276 Ill. 472, 114 N. E. 915. The drainage district appointed and authorized Dolan to supervise the work to the extent of seeing that the portion of the ditch which had been filled by local floods was excavated to the proper depth, and the earth deposited a sufficient distance back on the spoil banks, and that the work was prosecuted with reasonable industry and efficiency. The control and supervision exercised by Dolan had to do only with the results sought to be obtained by the drainage district, and not with the method or manner in which defendant in error was to do the work. Defendant in error operated his own machinery and employed his own workmen, which is a material matter to be taken into consideration in determining whether he was an independent contractor or an employee. Foster v. City of Chicago, 197 Ill. 264, 64 N. E. 322. Had Dolan discharged defendant in error within the proper exercise of his authority, the whole work would have stopped, as the district could exercise no control whatever over the dredging machinery or the men in the employ of defendant in error.

[3] There is no evidence in the record that supports the finding that defendant in error was an employee, but, on the contrary, the evidence conclusively shows that he was an independent contractor. As an independent contractor, he is not entitled to compensation under the Workmen's Compensation Act.

The circuit court erred in not setting aside the award of the Industrial Board. The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

SUPREME COURT OF ILLINOIS.

PEKIN COOPERAGE CO.

v.

INDUSTRIAL COMMISSION et al. (No. 12163.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—REVIEW.

If the evidence in favor of the applicant sustains the award of the Industrial Commission, the weight of the evidence to the contrary will not be considered by the reviewing court.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—REVIEW.

Determination of the facts upon contradictory evidence by the Industrial Commisison is final.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACCIDENTAL INJURY—"ARISING OUT OF THE EMPLOYMENT."

Where claimant, culling barrel staves for a barrel raiser, was assaulted by an employee, who was culling staves for another barrel raiser, because

* Decision rendered, Oct. 21, 1918. 120 N. E. Rep. 530.

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of dispute in regard to one taking staves from the rack of the other, he suffered an "accidental injury in the course of his employment," and one arising "out of the employment," within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

4. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

To authorize compensation under Workmen's Compensation Act, it is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment.

(For other cases, see Master and Servant, Dec Dig. § 371.)

Error to Circuit Court, Peoria County; Clyde E. Stone, Judge.

Proceedings under the Workmen's Compensation Act by Henry Rasor, employee, for compensation for injuries sustained by him while at work for the Pekin Cooperage Company. Award by an arbitrator in favor of claimant was confirmed by the Industrial Commission, writ of certiorari sued out of the circuit court was quashed, and, the judge of that court, having certified that the cause was one proper to be reviewed by the Supreme Court, the employer brings error. Judgment affirmed.

Fyffe, Ryner & Dale, of Chicago, for plaintiff in error.
Kirk & Shurtleff, of Peoria, for defendant in error.

DUNN, J. Henry Rasor received an injury while at work for the Pekin Cooperage Company, for which an award was made in his favor by an arbitrator under the Workmen's Compensation Act (Laws 913, p. 335), which was confirmed by the Industrial Commission. A writ of certiorari sued out of the circuit court of Peoria county was quashed on motion of the respondents, and, the judge of that court having certified that the cause was one proper to be reviewed by the Supreme Court, a writ of error was sued out for that purpose.

[1, 2] The question is whether Rasor's injury, which was received in the course of his employment, arose out of his employment, and it has been argued as if we were to determine it from the weight of the evidence. Our consideration of the evidence is limited to the inquiry whether the record contains competent evidence to sustain the award. If the evidence in favor of the applicant sustains the award, the weight of the evidence to the contrary will not be considered by the reviewing court. The determination of the facts upon contradictory evidence by the Industrial Commission is final.

On December 26, 1916, the Pekin Cooperage Company was engaged in the cooperage business in Peoria. Rasor was engaged in picking out or culling barrel staves for another employee, who was known as a "barrel raiser," whose duty it was to make the barrels. George A. Miller was culling staves a few feet from Rasor for another barrel raiser. It was the duty of each culler to cull staves for his barrel raiser, and in case his rack ran out of staves it was customary for the culler to take staves from another culler's rack. Miller had been taken from the half-barrel department and put to culling staves in the afternoon, and had been working about half an hour when the injury happened. He had taken a half-pint bottle of whiskey with him to the plant in the morning, from which he had taken two or three drinks, and he had about half the whiskey left. Shortly after the injury the superintendent sent Miller home because he was drinking on the job. Miller had gone to another part of the building a few minutes, and when he returned he took up some staves from Rasor's rack and put them in his own. Rasor objected to this in language which was offensive,

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and a fight ensued, the details of which are clouded in the obscurity which usually attends such occurrences. There is evidence tending to show, and which would justify the conclusion, that Miller was the aggressor throughout, and that Rasor did no more than defend himself. Rasor's claim is for injuries received in this encounter.

[3, 4] Rasor clearly suffered an accidental injury in the course of his employment. It was a sudden and unexpected mishap, occurring outside of the usual course of events, without any design on his part, while he was engaged at his work. The compensation to be provided and paid by the employer under the Workmen's Compensation Act is not, however, for all accidental injuries which may be sustained by his employees in the course of their employment, but only for such as also arise out of the employment. There must be some causal relation between the employment and the injury. It is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment. The courts administering compensation laws similar to ours do not disagree upon the interpretation of the law, but in the great variety of circumstances which they are called upon to review it is frequently difficult to make the application to the facts. In Armitage v. London & Western Railway Co., 86 L. T. 883 (a case under the English Workmen's Compensation Act), two boys, fellow workmen of the claimant, were "larking," and one pushed the other into a pit. The latter in anger threw a piece of iron at the former, but missed him and injured the claimant, who was engaged at his work. It was held that the act had no relation to the employment, but was an intentional wrongful act, and was not a risk of the employment. In Baird v. Burley, 45 Scot. L. R. 416, the claimant, who was working in a coal mine, was pursuing a fellow workman to prevent him from carrying off a hutch. The latter threw some rubbish, and the former, in seeking to avoid it, struck his head against the side of the passage. It was held the accident was caused by the act of a fellow workman outside the scope of his employment, and that the claimant was therefore not entitled to compensation. In Murphy v. Berwick, 43 Ir. L. T. 126, a customer came out of the bar of a hotel into the kitchen, which adjoined it, and made a rush at the cook, who in trying to avoid him threw her hand through a glass door and was injured, and it was held that the accident did not arise out of her employment. In New Jersey it was held that an employee is not entitled to compensatoin for an injury which was the result of horse play or skylarking, whether he instigated it or took no part in it. Hulley v. Moosbrugger, 90 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. To the same effect is Pierce v. Boyer Coal Co., 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970. This is contrary to our decision in the case of Pekin Cooperage Co. v. Industrial Board, 227 Ill. 53, 115 N. E. 128. The death of a watchman in a mill, who was killed by a robber, who concealed himself for the purpose of robbing the watchman, and not the mill, was held not to arise out of his employment. Walther v. American Paper Co., 89 N. J. Law, 732, 99 Atl. 263.

On the other hand, in the following cases the injuries have been held to arise out of the employment: Where a premeditated assault was made upon a schoolmaster by unruly pupils, resulting in his death. Trim Joint School District Board v. Kelly, [1914] A. C. 667. Where an attack was made on a cashier traveling with a large amount of money. Nesbit v. Rayne & Beam, [1910] 2 K. B. 689. Where a workman was injured by lightning upon a high and unusually exposed scaffold. Andrew v. Failsworth Industrial Society, [1904] 2 K. B. 32. Where a workman was bitten by a cat habitually kept on the premises. Rowland v. Wright, [1909] 1 K. B. 963. Where a stone thrown by a boy at a locomotive injured the engineer. Challis v. London & Southwestern Railway Co., [1905] 2 K. B. 154. Where an assault by a fellow workman on the claimant resulted from a struggle over a brush to be used in the work. McIntyre v. Rodg-

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ers & Co., 41 Scot. L. R. 107. Where a workman, whose duty it was to take care of the horses which he drove, objected to the amount of cold water which a fellow workman was throwing on the horses in washing them, and was injured in a fight growing out of the quarrel. Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. Where a workman was killed while at work by an intoxicated fellow workman, whose condition and habits were known to the superintendent. In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306. Where a worker on a railroad section was not doing his work properly, and upon his neglecting to follow the foreman's directions the latter told him to drop his shovel and get his time; but the man refused, and the foreman undertook to take his shovel from him and was injured. Western Indemnity Co. v. Pillsbury, 170 Cal. 868, 151 Pac. 398. In Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, we held that an injury to an employee, who was struck and injured by an automobile in going across the street from his working place to the line of his duty, for the purpose of telephoning orders in furtherance of the business of his employer, arose out of the employment.

Each of the decisions cited was rendered upon a consideration of the facts of the particular case. Two cases are seldom precisely alike in their facts. Some, at least, of the cases cited are doubtful, and with the conclusions reached in some of them we do not agree. All concur in the rule that the accident, to be within the Compensation Act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of the employment has been established. Where men are working together at the same work disagreement may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. The origin of this difficulty was trifling—the taking of a few staves from the claimant's rack, to which he objected, saying, as he testified, that if Miller would stay in there he would be up with the claimant. The dispute was concerning the employer's work in which the men were both engaged, and there is evidence tending to show that the claimant was not responsible for the assault.

The judgment will be affirmed.

Judgment affirmed.

STONE, J., having heard this case in the circuit court, took no part in its decision here.

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SUPREME COURT OF ILLINOIS.

SCULLY

v.

INDUSTRIAL COMMISSION OF ILLINOIS. (No. 12055.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT — "EXTRAHAZARDOUS" OCCUPATION — "EXCAVATING."

Digging trenches with shovel in a plumber's business of making private connections with city sewers and water pipes is "excavating," under Workmen's Compensation Act, § 3, subd. b, par. 2, naming such work as extrahazardous.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases. First Series. Extrahazardous.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"EXTRAHAZARDOUS" OCCUPATION.

Excavating for plumber's business of making private connections with city sewers and water pipes, being more dangerous than ordinary occupation is extrahazardous, though there be more hazardous excavations.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Injury to employee of plumber, engaged in making private connections with city sewers and water pipes, arises out of and in the course of his employment where, on his way to work, he, at employer's direction, gets on his truck to get pipe left over at another job and from pipeyard, and truck is struck by street car.

(For other cases, see Master and Servant. Dec. Dig. § 375[2].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"CASUAL" EMPLOYMENT.

The word "casual," as applied to employment in Workmen's Compensation Act, has reference to the contract for service, and not to the particular item of work being done at the time of injury; and, injured employee having been regularly employed for five months at time of accident, his employment was not casual.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series. Casual.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING BY INDUSTRIAL BOARD—REVIEW.

Finding of industrial board as to extent of disability from injury, being a legitimate conclusion from facts proved by competent evidence, is conclusive on the Supreme Court.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

* Decision rendered, Oct. 21, 1918. 120 N. E. Rep. 492.

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Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding by Edward De Vito under the Workmen's Compensation Act for compensation for injury, opposed by August Scully, employer. Award of the industrial board was confirmed by the circuit court, and the employer brings error. Affirmed.

Truman H. Miner, Alfred R. Hulbert. and George A. Oleson, all of Chicago, for plaintiff in error.

C. E. Heckler and R. E. Howe. both of Chicago, for defendant in error.

DUNCAN. C. J. This writ of error is prosecuted to review the record and judgment of the circuit court of Cook county confirming the award of the industrial board and entering judgment in favor of Edward De Vito, defendant in error, and against plaintiff in error, August Scully, his employer, for temporary total disability, and permanent partial disability, and for the sum of $200 for first aid. medical, surgical, and hospital service. The judge of the circuit court certified that the cause was one proper to be reviewed by this court.

The injury for which defendant in error claimed compensation was received by him on May 16, 1916. Plaintiff in error on that date was, and for a number of years prior thereto has been, engaged in the business of sewer building in the city of Chicago. The business consisted in making the necessary excavation and laying pipes for connecting the sewer and water pipes of the city with the private drains and water pipes of buildings under construction, which connecting pipes run into and under said buildings. Plaintiff in error was a licensed sewer builder, and usually did his work under subcontracts let to him by contractors for the plumbing work on the buildings, and he usually employed from two to five men for such work. De Vito had been in the employ of plaintiff in error as a laborer for about five months prior to and on the day of his injury in digging or excavating ditches from the inside of the houses to the sewers and water mains in the streets. It was also a part of his duty to assist plaintiff in error in gathering and transporting material to and from different jobs on which they were engaged. He and plaintiff in error both lived in the same house and were brothers-in-law. He usually took a street car on his way to and from his work. On the morning of the injury he was waiting on the corner of a street for a street car to go to his work when plaintiff in error came along in his Ford automobile truck and directed him to get on the truck and go with him to the pipeyard to get some pipe, and also to pick up some pipe on Central Park avenue which had been left over from another job and take it to the job on which they were then working. De Vito got onto the truck and accompanied the plaintiff in error to the pipeyard on Taylor street and Fortieth avenue, and there assisted plaintiff in error in loading some pipe fittings onto the truck. They then started to the place on Central Park avenue to pick up the material left over from a job there. On their way the truck was struck by a street car at Central Park and Chicago avenues, and De Vito received by the collision a broken arm and several cuts about the throat and face, from which injuries he has been totally incapacitated from work for 29 weeks, and suffered a permanent partial disability, by reason of which he has been unable to earn half as much since he returned to work as he earned before he received his injury. De Vito had received for his wages $3.75 a day, or over $20 per week.

[1,2] We cannot agree with plaintiff in error's contention that the business or occupation in which he was engaged and at which De Vito was working when injured was not extrahazardous, and therefore not within the terms of the Workmen's Compensation Act. The digging of sewer trenches with a shovel or spade must be held to be excavating within the meaning of the statute, as much so as if the excavation be

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made with machinery. Although the evidence does not disclose that fact, yet, as a matter of fact, it is within the common knowledge of every one that trenches of the character that De Vito excavated usually extend under the walls of the buildings and under the sidewalks and out into the streets. In such work he was necessarily exposed, occasionally, to the danger of the walls caving in, of material falling on him from buildings, and also of coming in contact with sewer and other dangerous gasses, as well as other dangers. Paragraph 2 of subdivision b of section 3 of the Workmen's Compensation Act (Hurd's Rev. St. 1915-16, c. 48, § 128) names, as extrahazardous business or occupations, "construction, excavating or electrical work." The various kinds of excavating that the statute denominates as extrahazardous are not specifically mentioned, but they necessarily include any kind of excavation that is attended with more than ordinary dangers of a simple occupation. The digging of post holes, or the digging of small drains for the surface drainage of houses or tents to prevent flooding with surface water in time of rains, would not be more hazardous than simple occupations, and, as has heretofore been indicated by the decisions of this court, such occupations, while in a sense of coming within the common definition of "excavating," would not be deemed and held extrahazardous. The trenches dug by De Vito necessarily had to be as deep as the sewers and water mains laid in the streets, and it requires no stretch of the imagination to see and understand at once that his occupation was more dangerous than an ordinary occupation and therefore extrahazardous. The degree of the hazard alone is not the test as to whether or not the occupation is extrahazardous. Plaintiff in error's business was extrahazardous, and, while it is true that other occupations can be named that are more hazardous, still that is no reason for saying that his business does not come within the terms of the statute. Uphoff v. Industrial Board, 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1; McLaughlin v. Industrial Board, 281 Ill. 100. 117 N. E. 819.

[3] De Vito was injured in the course of his employment and his injuries arose out of the employment. He was acting under the specific directions of his employer when he started to his working place to pick up the left-over material, and he and his employer were then engaged at a branch of the work necessary and incident to the main business or occupation in which he was employed—the gathering up and carrying material necessary to be used in such business or occupation. The danger to which he was subjected arose by reason of his obedience to the directions of his employer, and while engaged in an act or work which was a necessary incident to the main business of his employer. It does not matter that he had not yet arrived at the place where the excavating was to be done. An injury may occur within the course of the employment, and arise out of it, even though it happen while the employee is on his way to or from his usual place of employment or while engaged in the doing of an act that is necessary to, or an incident of, the employment. Friebel v. Chicago City Railway Co., 280 Ill. 76, 117 N. E. 467; Alexander v. Industrial Board, 281 Ill. 201, 117 N. E. 1040; Chicago Cleaning Co. v. Industrial Board, 283 Ill. 177, 118 N. E. 989.

[4] De Vito's employment was not casual, as argued by the plaintiff in error. His employment cannot be said to have been uncertain, haphazard, irregular, or incidental as distinguished from stated or regular. The word "casual," in the statute, has reference to the contract for service, and not to the particular item of work being done at the time of the injury. Aurora Brewing Co. v. Industrial Board, 277 Ill. 142, 115 N. E. 207. The evidence in the record clearly discloses that De Vito had been regularly employed by plaintiff in error for five months at his business or occupation of digging or excavating for sewers, etc. Within the meaning of the statute he was engaged at that very work or occupation when he was injured, although at the particular time of his injury he

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was only doing an act or work that was a mere incident of his employment. Alexander v. Industrial Board, supra.

[5] The Industrial Board found that De Vito was totally disabled for a period of 29 weeks, and allowed him $10 a week for that period, which was one-half, or less, of the weekly wage he was receiving at the time he was injured. He was allowed $5 a week for permanent partial disability, covering a period of 342 weeks. In addition to said sums he was entitled to and allowed $200 as first-aid, medical, surgical, and hospital service. His total allowance by the board, in addition to his first-aid, medical, surgical, and hospital service, amounts to $2,000. The limit to which the board might have gone in its allowance, under paragraph (h) of section 8 of the Workmen's Compensation Act, would have been $2,080, or $5 a week for a period of 416 weeks for the permanent partial disability. Plaintiff in error insists that the evidence in the record does not furnish any basis for such a finding, because the evidence shows that the injured arm was permanently disabled only 15 per cent of its ordinary usefulness. The evidence shows, however, that the injury was such that the earning capacity of De Vito was impaired one-half by reason of the incapacity of the arm for the employment in which he had been engaged. As a result of the fracture, his arm was left badly deformed. The ends of the fractured bone are in malposition, the lower fragment having slipped up over the upper fragment. The union of the broken bone is not firm. It is what is known as a fibrous union, and the arm is an inch and a quarter shorter than it was prior to the fracture. The evidence also shows that De Vito is compelled to do such work as shoveling principally with one arm, and his permanent earning capacity has been seriously impaired. There is ample evidence in the record to sustain the finding of the board. The finding of the board on this question being a legitimate conclusion from the facts proved by competent evidence, such finding is conclusive upon this court. Squire-Dingee Co. v. Industrial Board, 281 Ill. 359, 117 N. E. 1031.

For the reasons above given the judgment of the circuit court is affirmed. Judgment affirmed.

SUPREME COURT OF ILLINOIS.

SULZBERGER & SONS CO.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al. (No. 12140.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—NOTICE OF CLAIM.

That the employer was represented at the inquest over the body of a deceased employee, held within 30 days after the accident, sufficiently showed that the employer had notice within the time required by the Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—TIME FOR FILING RECORD ON APPEAL.

The record of a claimant under the Workmen's Compensation Act, on appeal from the decision of a committee of arbitration to the Industrial

* Decision rendered, Oct. 21, 1918. 120 N. E. Rep. 535.

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Board, *held* to be filed within time required by the statute as existing December 4, 1914, where extensions of time had been granted.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—SUFFICIENCY.

In a proceeding under the Workmen's Compensation Act to recover for the death of plaintiff's husband, evidence *held* sufficient to preclude reversal on appeal from decision of circuit court sustaining award.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under Workmen's Compensation Act by Victoria Stock against the Sulzberger & Sons Company, employer, to recover for the death of Sebastian Stock. Compensation was awarded, and affirmed by the circuit court on certiorari, and the employer brings error. Affirmed.

Burt A. Crowe, of Chicago, for plaintiff in error.
Corinne L. Rice, of Chicago, for defendant in error.

COOKE, J. Victoria Stock made application for adjustment of her claim against the Sulzberger & Sons Company under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) for the death of her husand, Sebastian Stock, who, she alleged, died on account of injuries received while he was in the employ of the Sulzberger & Sons Company. A committee of arbitration was of the opinion that the applicant was not entitled to recover, and refused to award compensation. The applicant petitioned the Industrial Board for a review of the decision of the committee of arbitration, and the Industrial Board awarded compensation to the applicant of $6 per week for 416 weeks. The plaintiff in error, the Sulzberger & Sons Company, sued out a writ of certiorari in the circuit court of Cook county to review the proceedings of the Industrial Board. After the case had been remanded several times to the Industrial Board, with directions to eliminate hearsay evidence and in respect to other matters, the finding of the Industrial Board was finally confirmed, and the presiding judge certified that this was a case proper to be reviewed by this court.

[1] It is first contended that plaintiff in error did not have notice of the accident within 30 days from its date, as required by the Workmen's Compensation Act It is alleged that the accident occurred on June 8, 1914. On July 8, 1914, the attorney for the applicant notified plaintiff in error of the accident and the consequent claim. It is not denied that this notice, which was sent by mail, was received by plaintiff in error; but it is contended that it was not received until July 9th. The basis for this contention is that on July 9th this notice was transmitted by mail to the attorney for plaintiff in error, and that it was the custom of the plaintiff in error to answer every letter received upon the date of its receipt. Conceding that this notice was not actually received until July 9th, it appears that plaintiff in error had ample notice that it was claimed that Sebastian Stock died as the result of a fall which he received in the course of his employment at the plant of the plaintiff in error on June 8, 1914. An inquest was held over the body of the deceased, and plaintiff in error was represented by an attorney and one of its foremen at this inquest. In transmitting the notice sent on July 8, 1914, to its attorney, the plaintiff in error reminded him that this was the case where it was claimed that death resulted from a fall at the plant, and that one of the men from the attorney's office had represented plaintiff in error at the inquest. At the inquest evidence was produced for the purpose of showing that the death resulted from a fall received at the plant of plaintiff in error. We are of

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the opinion that plaintiff in error had all the notice required by the statute of the claim that the death of the deceased resulted from an accident.

[2] Plaintiff in error also contends that defendant in error's record, upon appeal from the decision of the committee of arbitration to the Industrial Board, was not filed within the time required by the statute. The petition for review was filed December 4, 1914, and the record was filed with the Industrial Board March 22, 1915; several extensions of time in which to file the record having been granted in the meantime, and each one being granted before the prior extension had expired. The statute then in force provided:

"And unless such party petitioning for a review shall within twenty days after the receipt by him of the copy of said decision, file with the board either an agreed statement of the facts appearing upon the hearing before the arbitrator or committee of arbitration, or if such party shall so elect, a correct stenographic report of the proceedings at such hearings, then the decision shall become the decision of the Industrial Board: Provided, that such Industrial Board may for sufficient cause shown grant further time, not exceeding thirty days, in which to petition for such review or to file such agreed statement or stenographic report."

We are of the opinion that this statute was complied with, and that the record, on appeal from the decision of the committee of arbitration to the Industrial Board, was filed in ample time.

[3] The principal contention of plaintiff in error is that there was no competent evidence in the record tending to prove that Sebastian Stock suffered an accident at the plant of the plaintiff in error which was the proximate cause of his death. We are not permitted, however, to weigh the evidence, and can only look into the record for the purpose of determining, as a matter of law, whether there was any competent evidence tending to support the finding and award of the Industrial Board. There is evidence in the record which tends to show that on June 8, 1914, Stock fell on his back while descending a short stairway in the plant of the plaintiff in error during the forenoon of that day. He did not complain at that time of being hurt or injured by the fall, but shortly before noon he quit work, complaining of a pain in his stomach, and went home. A physician was called, and he died about 1 o'clock on the following morning. His attending physician gave it as his opinion that he died as the result of traumatism. A post mortem examination disclosed that the deceased had been suffering from heart disease, and that he had œdema of the lungs and brain. Another physician testified that, assuming that the deceased had organic heart trouble and œdema of the lungs, a sudden fall, although not serious enough to cause any external injury, might result in his death.

As there is sufficient evidence in the record, standing alone, to sustain the finding and award of the Industrial Board, the judgment of the circuit court must be affirmed.

Judgment affirmed.

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APPELLATE COURT OF INDIANA.

DIVISION No. 1.

PEDLOW

v.

SWARTZ ELECTRIC CO. (No. 13306.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—FINDING OF BOARD.

Where there is some evidence to sustain finding of Industrial Board in proceeding under the Workmen's Compensation Act, it will not be disturbed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EFFECT OF AGREEMENT.

An agreement for compensation between an injured employee and the employer, approved by the Industrial Board, under Workmen's Compensation Act, § 57, has the effect of and award.

(For other cases. see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EFFECT OF AWARD.

An award of compensation under the Workmen's Compensation Act. not reviewed or set aside, is conclusive on both parties, except as provided in section 45, allowing a modification on change of conditions.

(For other cases. see Master and Servant, Dec. Dig. § 416.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW.

In a hearing under the Workmen's Compensation Act, § 45, to review an award, because of change of conditions, the parties are bound by the proof made at the former trial, and proof is limited to evidence to prove or disprove the contention that the conditions existing at the time of the award have changed.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act by James L. Pedlow, opposed by the Swartz Electric Company, employer. From an award by the Industrial Board, the employee appeals. Affirmed.

Jacob L. Steinmetz, of Indianapolis, for appellant.

Elmer E. Stevenson, of Indianapolis, for appellee.

FELT, P. J. This is an appeal from an award of the full Industrial Board of Indiana. Appellant has assigned as error that (1) the award is contrary to law; (2) that the full board erred in awarding appellant 2 weeks' compensation. Appellant, in his brief states that:

"The action was an application by appellant, against appellee, for a review of an award of the Industrial Board of Indiana, on account of a change in condition; that the disability of appellant, on account of said

* Decision rendered, Nov. 1, 1918. 120 N. E. Rep. 603.

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injury, had increased since the date of said award; and that the previous award be increased."

On the 16th day of January, 1918, the date of the hearing before Samuel R. Artman, one of the members of the Industrial Board, appellant filed what he denominated "an application for the review of an award on account of a change in condition," in which he alleges that appellant's disability on account of his original injury "has recurred since the date of said award"; that "the same has increased since the date of said award." Appellant was awarded two weeks' compensation, at the rate of $13.20 per week, to be paid in a lump sum. He thereupon applied for a review of such award, and after a hearing by the full board it made a finding and award which, omitting uncontroverted details, is in substance as follows:

Appellant was employed by appellee at $24 per week, and while so employed received an injury to the middle finger of his right hand, which became infected, and by reason of which he was totally disabled for the period of 4 3/7 weeks from May 1, 1917; "that on the 14th day of June, 1917, the plaintiff and defendant entered into a compensation agreement whereby it was agreed that the plaintiff's injury was occasioned by an accident arising out of and in the course of his employment; that the defendant should pay to the plaintiff, and that plaintiff should accept compensation at the rate of $13.20 per week, beginning May 15, 1917, together with the costs of the proper medical and hospital attention occasioned by his injury, for the first 30 days thereafter; that the compensation payments should continue at said rate so long as the plaintiff was totally disabled for work on account of said injury; that said agreement was filed with the Industrial Board of Indiana on June 19, 1917. and was approved by said board on June 20, 1917; that on the 2d day of August, 1917, the plaintiff and defendant entered into a supplemental compensation agreement, whereby it was agreed that the permanent partial impairment of the plaintiff's middle finger was 25 per cent; that there had been paid to the plaintiff, under the previous compensation agreement, 2 3/7 weeks' compensation, amounting to $30.17; that there was due and unpaid to the plaintiff, on account of the permanent partial impairment of the middle finger, compensation for 5 weeks 1⅛ days additional, amounting to $68.83, and making a total compensation of 7⅛ weeks, amounting to $99; that said agreement was to be filed with the Industrial Board of Indiana as a supplemental final agreement; that said supplemental and final agreement was filed with the Industrial Board of Indiana on August 4, 1917, and was approved by the board on August 6, 1917; that pursuant to said agreement the defendant paid to the plaintiff the additional $68.83 and took his receipt therefor, in which it was stipulated, 'It is hereby understood and agreed that there is a 25 per cent permanent partial impairment of the middle finger of the plaintiff's right hand,' which receipt was filed with the Industrial Board of Indiana on the 4th of August, 1917; that the plaintiff, as a result of his accident of April 27, 1917, received no injury, except to the middle finger of his right hand; that the infection thereof did not extend to any other portion of the plaintiff's body than the middle finger of the right hand, and did not cause any permanent partial impairment to any other member of the plaintiff's body; that in the early part of September, 1917, the plaintiff's middle finger became inflamed by reason of a recurrence of the infection thereof; that the plaintiff immediately notified the defendant, who sent him to an attending physician, who treated said finger, and as a result of that treatment it healed within the course of 3 or 4 days; that as a result of the return of said infection the plaintiff was disabled for work for a period of 2 weeks; that the recurrence of said infection did not aggravate, change, or increase the degree of permanent partial impairment of said finger.

"*Award.*—It is therefore considered and ordered by the full board

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that the plaintiff be and is hereby awarded 2 weeks' compensation at the rate of $13.20 per week, to be paid in cash in a lump sum, on account of a disability to work occasioned by the recurrence of the infection in his middle finger of the right hand in September, 1917."

Appellant cites and relies on the provisions of section 31 the compensation statute (section 8020o1, Burns' Supplement of 1918), and section 45 of the act, being section 2020c2 of the aforesaid statutes. The provision of section 31 so relied upon states that:

"In all other cases of permanent partial disability, including any disfigurement which may impair the future usefulness or opportunities of the injured employee, compensation * * * shall be paid when and in the amount determined by the Industrial Board, not to exceed 55 per cent of average weekly wages per week for a period of 200 weeks."

Section 45 of the act authorizes a review by the Industrial Board "on the ground of a change in condition" arising after the award was made.

[1] Appellant, in effect, contends that the board, having found that he was entitled to some additional compensation, committed an error of law in limiting the same to 2 weeks, because of the "evidence warrants a larger award than 2 weeks' compensation at $13.20 a week." The assignment that the award is contrary to law presents "both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts." Section 8020s2, Burns' supp. 1918. The finding clearly authorizes and sustains the decision and award of the full board. The evidence at least tends to sustain the finding. There being some evidence to sustain the finding, the action of the board in that regard will not be disturbed on appeal. Interstate, etc., Co. v. Szot, 115 N. E. 599.

[2] The agreement by the parties, made on August 2, 1917, and approved by the board on August 6th, has the full force and effect of an award. Section 57 of the act, supra; section 8020o2. Burns' Supp. 1918; In re Stone. 117 N. E. 669.

[3] The award so made has not been reviewed or set aside. It is therefore final and conclusive upon both parties, except as provided in section 45 of the act, supra. In a hearing based on the provisions of such action, the original award stands as an adjudication upon all matters in dispute up to the time such award was made, and neither party may thereafter be heard to say that such award was wrong in any respect, or that in any subsequent hearing evidence is proper to show that either the injury or disability was greater or less than that indicated by such award.

[4] In a hearing under the provisions of section 45 of the act, supra, the parties are bound by the proof made at the former hearing, upon which the finding was based and the award made, and the proof is limited to evidence tending to prove or disprove the contention that the conditions existing at the time the award was made have changed subsequent to the making thereof. Bloomington, etc., Co. v. Industrial Board, 276 Ill. 120, 114 N. E. 511; Simpson Const. Co. v. Industrial Board, 275 Ill. 366, 114 N. E. 138; City of Pana v. Industrial Board, 279 Ill. 279, 116 N. E. 647. The award of August 6th is unaffected by the subsequent proceedings.

If the questions appellant seeks to present relate to the award of August 6th, they are unavailing, because they are res adjudicata, as above shown. If the proposition relied on for reversal is the contention that the allowance of 2 weeks' compensation by the full board, for the recurring injury and the additional disability occasioned thereby, is too small, appellant cannot succeed, for the evidence sustains the findings, and the award of 2 weeks' compensation made by the full board is fully authorized by such findings.

No error is presented, and the award of the full Industrial Board is therefore affirmed.

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APPELLATE COURT OF INDIANA.

DIVISION No. 1.

PURITAN BED SPRING CO.

v.

WOLFE. (No. 10279).*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PRE-EXISTING DISESASE.

Where an employee affected with disease receives a personal injury under circumstances entitling him to compensation had no disease been involved, and such disease is materially hastened to a final culmination by the injury, an award under the Workmen's Compensation Act may be had if the injury resulted from accident.

(For other cases, see Master and Servant, Dec. Dig. § 376[1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"ACCIDENT"—EXISTING DISEASED CONDITION—STRANGULATED HERNIA.

Where an employee afflicted with hernia lifted a bale of wire weighing about 150 pounds and thereby caused the intestine to protrude into the existing hernial sac, necessitating an operation to save his life, he was entitled to compensation, under the Workmen's Compensation Act; the injury being an "accident," which is any unlooked-for mishap or untold event, not expected or designed.

(For other cases, see Master and Servant, Dec. Dig. § 376[1].)

(For other definitions, see Words and Phrases, First and Second Series, Accident.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—SUFFICIENCY.

In a proceeding under the Workmen's Compensation Act for injuries sustained by an employee in lifting a bale of wire weighing about 150 pounds resulting in strangulating a preexisting hernia, evidence *held* to sustain the award of the industrial board.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Industrial Board of Indiana.

Proceedings under the Workmen's Compensation Act by Albert Wolfe to obtain compensation for personal injuries, and opposed by the Puritan Bed Spring Company, employer. Compensation was awarded by a single member and subsequently by the full board, and the employer appeals. Affirmed.

Joseph W. Hutchinson, of Indianapolis, and Frederick K. Warna, for appellant.

E. E. McFerren, of Indianapolis, for appellee.

HOTTEL, J. On January 28, 1918, appellee filed with the Indusrial Board of Indiana an application in the usual form for compensation for injuries alleged to have been sustained by him while in appellant's employ. A hearing on February 8, 1918, by Samuel R. Artman, a member of said

* Decision rendered, Oct. 18, 1918. 120 N. E. Rep. 417.

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board, resulted in an award in favor of appellee. Upon petition by appellant for review, said case was heard by the full board on March 1, 1918, with the result that a finding and award was made by the full board substantially the same as that made by the single member thereof. To this award the appellant excepted, and from it this appeal is prosecuted.

Appellant assigns as error that said award is contrary to law. Under this assignment appellant challenges the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts. The part of said finding pertinent and material to a consideration of these questions is, in substance, as follows: On November 29, 1917, appellee was in the employment of appellant at an average weekly wage of $21.60. On that date, while engaged in the discharge of the duties of his employment, appellee lifted a bale of wire, weighing about 150 pounds, to a reel which stood about even with the appellee's shoulders. In lifting the bale of wire, appellee severely strained his body, and thereby caused a protusion of an intestine into *an existing hernial sac or aperture*. By reason of the strain of appellee's body at the time said intestine was impinged or held in said hernial sac, producing an immediate intestinal strangulation. Appellant had actual knowledge of appellee's injury immediately thereafter. On December 15, 1917, appellant executed a report of such injury to the Industrial Board and delivered the same to its insurance carrier. Appellant did not furnish appellee an attending physician for treatment of his injuries nor the necessary surgical and hospital services and supplies required thereby. The strangulation aforesaid required an immediate surgical operation in order to save appellee's life. Appellee procured his own surgeon, Dr. Gatch, of Indianapolis, to perform said operation, and a reasonable fee for his services in performing the operation and treating appellee following it and treating the first 30 days after the injury is $60. Appellee procured his own hospital services and supplies and thereby incurred within the first 30 days after his injury an expense of $57.14, which he has paid. As a result of his injury, the appellee was totally disabled for work continuously from the date thereof until and including January 23, 1918.

It is insisted by appellant in effect that this finding affirmatively shows that appellee's injury was not accidental, or at least fails to show that such injury was accidental This contention is in the main based on the words of the finding which we have italicized, supra.

[1] Appellant concedes, and correctly so, that where an employee affected with disease received a personal injury under such circumstances that the act in question would entitle him to compensation had there been no disease involved, and such disease is materially hastened to a final culmination by the injury, there may be an award, if it is shown that such injury was the result of accident; that in such cases the court will not undertake to measure the degrees of disability due respectively to the disease and to the accident, but the consequence of the disease will be attributed solely to the accident. Indianapolis Abattoir Co. v. Coleman, 117 N. E. 502, 503; In re Bowers, 116 N. E. 842, 843.

[2] It is insisted, however, in effect that these propositions of law cannot avail appellee for the reason that the finding here shows that he was afflicted with a disease or disabling physical condition which rendered him susceptible to the injury for which compensation was awarded, upon exposure to "some slight incident" either within or outside of the employment, and that in such cases the disease or condition, rather than the accident, will be treated as the cause of the disability. It is argued that the finding of the board that the lifting of the wire caused the intestine to protrude into an "*existing hernial sac or aperture*," affirmatively shows that appellee's condition, rather than the accident, was the proximate cause of the disability for which compensation was allowed, and that the mere fact that the disability occurred during his employment affords no justification for the award.

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We think appellant confuses the injury and resulting disability upon which the award is predicated with the condition which made such injury or disability more likely to occur. Both said condition and the injury from which the disability resulted in this case—that is, both the hernial sac or aperture and the protrusion and strangulation of the intestine therein—might have been the result of the accident complained of, in which case we assume that liability for compensation under the act in question would not be disputed. However, under the board's finding, the condition, viz., the existence of the hernial sac, was present before the accident occurred; but the disability upon which the award is predicated resulted from the protrusion of the intestine into the said sac and the resulting intestinal strangulation which necessitated the immediate surgical operation. The board expressly finds that the protruding of the intestine into the hernial sac with the resulting strangulation was caused by the lifting of the bale of wire This finding we think clearly brings the case within the application of the rules announced in the cases supra. See, also, Haskell & Barker Car Co. v. Brown, 117 N. E. 555; In re Bowers, 116 N. E. 842; In re Brightman, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; Milwaukee v. Industrial Com. ,160 Wis. 238, 151 N. W. 247; La Veck v. Parke Davis Co., 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D, 1277, and cases cited.

Under these authorities, the mere fact that appellee's condition made him more susceptible to the particular injury which resulted in his disability furnishes no ground for holding that the disease or condition, rather than the accident, was the proximate cause of the injury upon which the allowance for disability is based. We recognize that there is a line of compensation cases in other jurisdictions which give to the word "accident," used in the respective compensation acts, a restricted meaning which in a measure justifies appellant's contention; but the weight of authority and the better reason we think favors the adoption of the popular meaning of said word, which includes "any unlooked for mishap or untoward event not expected or designed." This court has given to said word the popular meaning indicated. Haskell & Barker Co. v. Brown, supra; In re Ayers, 118 N. E. 386; Robbins v. Original Gas Engine Co., 191 Mich. 122, 157 N. W. 437.

[3] As affecting appellant's contention that the finding is not supported by the evidence, we deem it sufficient to say, generally, that there was evidence to the effect that appellee had been in appellant's employ for a number of years; that in 1914 while in its employ he submitted to a surgical operation for hernia. Immediately or shortly after this operation, appellee had a case of typhoid fever, which it seems prevented the results of said surgical operation from being entirely satisfactory. It appears, however, that he went back to his old job with appellant, and according to his statement he never lost a day, and was not bothered in his work on account of hernia, but that some time in September previous to his accident he saw a lump in his side, and because of his old condition he quit work for about a week, but was not sick. He "saw the lump coming there and took it easy." After laying off, he went back to his job with appellant and did the same kind of work he had been doing. On the morning of the accident, he went to his work, so far as the evidence shows in his usual health. During the progress of his work he lifted a bale of wire weighing about 150 pounds up to a reel about even with his shoulders, when he "suddenly became pained and sick and unable to work." He went home and called a doctor, who found his condition to be that indicated in the finding, supra. Appellant's witness Dr. Gatch testified in effect that where there is an opening or hernia sac pressure is liable to cause a protrusion; that assuming there was such an opening, and that appellee immediately before the accident lifted a dead weight of 150 pounds to a height of 4 feet, he would say that it was the pressure

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from lifting that caused the protrusion; that he would have no doubt about it.

The recital of this evidence is sufficient, we think, without comment, to show that it justifies the finding of the board. For other cases supporting this conclusion, see Sugar Valley Coal Co. v. Drake, 117 N. E. 937; Bell v. Hayes-Ionia Co., 192 Mich. 90, 158 N. W. 179; Crowley v. City of Lowell, 223 Mass. 288, 111 N. E. 786; In re Madden, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000; In re Mooradjian, 229 Mass. 521, 118 N. E. 951.

The award of said board is therefore affirmed, with 5 per cent added as provided by section 3 of the amendment of 1917 (Acts 1917, p. 155, c. 63) to the Workmen's Compensation Act (Acts 1915, c. 106).

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

VONNEGUT HARDWARE CO. et al.

v.

ROSE et al. (No. 10320.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—REVIEW.

Workmen's Compensation Act, as amended by Acts 1917, c. 63, does not give Appellate Court power to weigh evidence in reviewing award of Industrial Board, although member of such board who heard the evidence found for appellant, and award from which appeal is prosecuted was made by the other two members of the board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—REVIEW.

Where evidence as to whether refusal to permit operation was such misconduct as to deprive decedent's dependents of the benefit of the Workmen's Compensation Act was clearly open to more than one inference by reasonable men, determination of Industrial Board with reference thereto cannot be disturbed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—REVIEW.

Finding of Industrial Board, as to whether an autopsy was necessary to determine the cause of death, and whether the demand therefor was made within a reasonable time, based on conflicting evidence, will not be disturbed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AUTOPSY.

A demand for autopsy should be made at a reasonable time and place.

(For other cases, see Master and Servant, Dec. Dig. § 399.)

* Decision rendered. Oct. 31, 1918. 120 N. E. Rep. 608.

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5. MASTER AND SERVANT—AWARD OF INDUSTRIAL BOARD —REVIEW.

In proceeding under Workmen's Compensation Act, *held*, there was some evidence to support finding of Industrial Board that the strangulation of the intestines which caused's decedent's death resulted from hernia, and that the hernia was caused by a strain resulting from master's work, so that award would be affirmed.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Application by Lena D. Rose and another for compensation for the death of Louis I. Rose, deceased employee. Finding and award in favor of applicants by a majority of the Industrial Board, and the Vonnegut Hardware Company, employer, and others, appeal. Award affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellants.

Thomas W. Perkins and Lehman & Faust, all of Indianapolis, for appellees.

HOTTEL, J. Appellees, Lena D. Rose and Georgia Rose, are respectively widow and daughter of Louis I. Rose, now deceased. On June 16. 1917, said Louis was alive and in the employe of appellant Vonnegut Hardware Company. On said day, while so employed and in the discharge of his duties connected therewith, he was taken sick, and so informed the foreman under whom he was working. He thereupon went home. A few days later he was sent to the hospital. It there developed that he had hernia. He died September 2, 1917. On February 2, 1918, appellees, as the sole dependents of said deceased, filed with the Industrial Board their application in the usual form for compensation. A trial before Samuel R. Artman, a member of said board, on February 19, 1918, resulted in a finding and award for appellants. A review of the full board was had on March 28, 1918, which resulted in a finding and award by a majority of said board (said Artman not joining therein) in favor of appellees. This latter finding, pertinent to the questions herein discussed, is in substance as follows:

In June 16. 1917, one Louis I. Rose was in the employment of appellant Vonnegut Hardware Company at an average weekly wage of $10 as a general laborer or roustabout in said appellant's hardware store in the city of Indianapolis. Decedent's duties required him to keep the aisles clear, and to move the boxes and barrels out of the aisles when they were placed therein by others. On some occasions the boxes and barrels were extremely heavy. On June 16, 1917, while engaged in the discharge of his duties, decedent moved a barrel weighing about 125 pounds, and in moving said barrel accidentally ruptured himself, producing a right inguinal hernia. Decedent informed the foreman of his injury immediately after it occurred, and went home. On June 19th following appellant provided decedent with an attending physician, and on June 27th caused him to be taken to the Methodist Hospital in said city. where he remained for about 10 days, at the expiration of which he returned home and later resumed his work, and worked for 2 weeks. At the expiration of 2 weeks, because of his disability resulting from his injury. decedent discontinued work, and soon thereafter was again taken to the hospital by his employer, where he died on September 2, 1917. On September 7, 1917, appellant made a written demand upon appellees for permission to exhume the body of said decedent and hold an autopsy thereon, which demand was refused by appellee Lena D. Rose. Decedent left surviving him as his sole and only dependents the appellees. who were living with him at the time of his injury and at the time of his death, and were wholly dependent upon him and were supported by him. From the date of his injury until

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his death, or 11 weeks. appellant paid decedent full wages, and during that period decedent earned wages for 2 weeks only. On June 16. 1917, appellant association was the insurance carrier of appellant company.

[1] From the award rendered on this finding appellants appeal and assign as error that it is contrary to law. Under this assignment it is first contended that said finding is not sustained by sufficient evidence, and in support of this contention it is insisted in effect that since the amendment of the Workmen's Compensation Act (Acts 1917, p. 155), which permits both the sufficiency of the facts found and the sufficiency of the evidence to sustain the finding to be challenged by an assignment of error that the award of the full board is contrary to law, this court is given authority to weigh the evidence; that in view of the fact that the member who heard the evidence found for appellants, and that the award from which the appeal is prosecuted is made by the other two members alone. this court should exercise the discretion and power authorized by said amendment, weigh the evidence, and render judgment accordingly.

Appellant concedes, and properly so, that prior to the passing of the amendment of 1917 this court had held that it had no power to weigh evidence. It is insisted, however, that said question had not been expressly passed upon by the court. As affecting this contention it is sufficient to say that there is nothing in said amendment of 1917 that can be said to indicate any intent on the part of the Legislature to give to the appellate tribunal power to weigh evidence in such cases. The amendment clearly was intended merely to furnish a method of challenging the sufficiency of the evidence, the same as furnished by a like ground in motion for new trial in the ordinary civil case. The courts had so long and so frequently held that a like reason in a motion for a new trial did not authorize the weighing of the evidence, but merely tendered to the appellate tribunal the question of whether there was any evidence to support each of the elements of the cause of action essential to recovery, that the Legislature could not have been ignorant of such holdings, and must have intended a like meaning of the language used in said amendment. It is argued, however, that in any event the evidence fails to support the finding, in that it shows among other things that the appellants asked for an operation on decedent before his death, that such operation would in all probability have saved his life, and that such operation was refused by decedent and appellees.

It is sufficient to say that the evidence on this branch of the case is conflicting. The physician furnished by appellant testified that on Thursday before the deceased died on Sunday he told Mr. Rose that there was "no chance of him getting well in his present condition. The only thing was to operate. That the only chance to save him was to do the operation and see where the bowel was strangulated." When asked if he made any statement concerning the operation to Mrs. Rose, he answered: "Yes; I did. They were there. * * * They refused the operation." The widow denied the request testified to by Dr. Fosler, but says that Dr. Sowders told her on Thursday that he would like to have an operation; that she went over and waited until 4 o'clock, and Dr. Fosler did not come; that Dr. Sowders then told her on Saturday morning at the hospital that "he could not help my husband any more. That was [what] Dr. Sowders say; so what was the use of having an operation. * * * I believe he knew what he said." The son testified that the only times anything was said to him about an operation was on two occasions. The first was at the doctor's office, when he told him in substance that his father had a very sore appendix; that he had no doubt but that he had appendicitis. This was the day before the point of rupture was discovered; that the following day he switched from what he said, and said that "he knew for a certainty * * * that in fact he did not have appendicitis; that the rupture had been discovered at the hospital. and that. not the appendix, was the trouble; that he would put a

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truss on for the rupture; that he would have no further trouble after he had reduced the present stangulation." The other conversation was with Dr. Fosler on Friday preceding the father's death on Sunday, and he then did not say that an operation was necessary to save his life, but said he did not know whether it would save it. "He said that there was some chance, but he could not say positive, but as he saw it he would probably die if he didn't have an operation, and an operation might possibly pull him through, although he would not recommend it, and he said he wanted to have authority, * * * if he took a chance. because he said he didn't have such a good chance of coming through at all."

The better reasoned cases and the great weight of authority seem to be to the effect that the right of compensation under the Workmen's Compensation Acts will be defeated by the refusal of the injured party or those representing him to submit to an operation in those cases only where the operation is not attended with substantial danger to life or health or extraordinary suffering, and where "according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering." Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A, 381, Ann. Cas. 1915D, 476. and cases there collected and cited.

[2] We have indicated enough of the evidence on this branch of the case to show that there is conflict therein. Some of it, at least, tended to show that the operation contemplated was a dangerous one; that, if it was requested, the request came too late. and at a time when the condition of decedent was such that recovery therefrom would have been doubtful and uncertain. Whether a refusal to permit the operation under such circumstances was such misconduct on the part of the decedent and those acting for him as to deprive his dependents of the benefits of said Compensation Act under the authorities, supra, was clearly open to more than one inference by reasonable men, and hence was a question of fact which, when determined by the Industrial Board, cannot be disturbed by the appellate tribunal.

[3, 4] It is contended by appellants that appellees were not entitled to an award, because they refused appellants the benefits of an autopsy, and that such examination of the body was necessary in this case to determine the cause of death. Here again there is conflict in the evidence on the question of the necessity therefor, and also on the question of the time of its demand. There was some evidence warranting the inference that there was no necessity for such autopsy, and according to the testimony of both the mother and the son there was no such demand made until Friday after the death of decedent. The decedent died on Sunday, and was buried on the following Monday. Whether the refusal of a demand for an autopsy, made after the burial of the workman, will in any case deprive his dependents of their right to compensation under said act, we need not determine. It is sufficient to say that a demand therefor should be made at a reasonable time and place. Indianapolis Abattoir v. Bryant, 119 N. E. 24. See, also, Root v. Accident Co., 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed in 180 N. Y. 527, 72 N. E. 1150; American Ins. Co. v. Nuckles (Tex. Civ. App.), 187 S. W. 497. In this case the appellants knew of the death of Mr. Rose as soon as it occurred. A representative of the Vonnegut Company called at the home of the appellees the day before the burial. Under these facts, and the cases, supra, the finding of the Industrial Board on said question is conclusive on this court.

[5] It is also claimed in effect that the evidence does not show that decedent's death was the result of any accident, and fails to show any connection between what decedent was doing on the morning he took sick and the strangulated intestine which caused his death. The evidence upon this branch of the case is not convincing; but we are unable to say that there was no evidence authorizing the inference drawn by the board.

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There was evidence showing that the work of decedent required him to keep the aisles clear in appellant Vonnegut's place of business; that to do this he was frequently required to move boxes and barrels, the latter sometimes weighing from 125 to 400 pounds. It was shown that on the day he took sick he moved one of these barrels. After doing this kind of work he went to his foreman and complained, and then was sent or went, home. When he got home, he complained of being sick and said, "It hurts me inside." Later he told his foreman in substance that he was lifting a barrel on the morning he took sick and strained himself. After being in bed 3 days, a physician employed by the Vonnegut Company was called. The physician ordered him to the hospital, where he remained 10 days. The doctor first thought he had appendicitis, but later discovered the rupture. During his disability appellant Vonnegut Company paid him his wages, and paid his hospital bills, and furnished him the services of a physician and surgeon. After leaving the hospital, he went back and attempted to work for the Vonnegut Company, and after working 2 weeks took sick again, and was again sent to the hospital by said company's physician. Dr. Fosler. He was then sick until he died. The death certificate signed by Dr. Fosler gave the cause of death as strangulated intestines. Dr. Fosler testified he could not tell what caused the bowels to strangulate. Other doctors, however, who saw decedent in the first part of his sickness, testified that in their opinion the strangulation was caused by the hernia. The evidence indicated is, we think, some evidence at least tending to support and authorize the finding of the board that the strangulation of the intestines which caused decedent's death resulted from hernia, and that the hernia was caused by the strain resulting from appellant's work of lifting on the morning he took sick, thus showing a continuous causal connection between the lifting and death. In support of this conclusion, see Puritan Bed Spring Co. v. Wolfe (No. 10279, decided this term), 120 N. E. 417, and cases cited; Robbins v. Original Gas Engine Co., 191 Mich. 122, 157 N. W. 437; In re Madden, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000; Retmier v. Cruse, 119 N. E. 32; Cheverly v. Gaslight, etc., Co., 1 B. W. C. C. 82; Simpson Construction Co. v. Industrial Board, 275 Ill. 366, 114 N. E. 138; Bloomington, etc., Co. v. Industrial Board, 276 Ill. 120, 114 N. E. 511.

For the reasons indicated the award of the Industrial Board is affirmed, and 5 per cent damages added, as provided by section 3 of the amendment of 1917 to the Workmen's Compensation Act. Acts 1917, p. 155.

SUPREME COURT OF KANSAS.

McGARVIE et ux.

v.

FRONTENAC COAL CO. (No. 21756).*

(Syllabus by the Court.)

MASTER AND SERVANT—ACTION FOR COMPENSATION—DEPENDENCY OF PARENTS—EVIDENCE.

The evidence examined and found insufficient to sustain a finding of plaintiff's partial dependency on their 34 year old son for support, and

* Decision rendered, Oct. 12, 1918. 175 Pac. Rep. 375.

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insufficient to justify a judgment against the son's employer for compensation on account of the son's death in the latter's employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from District Court, Crawford County.

Action by John McGarvie and wife against the Frontenac Coal Company for compensation for the death of Peter McGarvie, an employee. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded, with instructions to enter judgment for defendant.

G. W. Earnshaw, of Joplin, Mo., and J. J. Campbell, of Pittsburg, for appellant.

Arthur Fuller and W. J. True, both of Pittsburg, for appellees.

DAWSON, J. The plaintiffs are the parents of Peter McGarvie, a coal miner, who met his death in the defendant's employment. Compensation for them was sought under a claim of their partial dependency on the deceased. The trial court found—

"from the evidence and admissions and pleadings that the earnings of the said Peter McGarvie for the year previous to his death was * * * $528.51, and that three times said amount was * * * $1,585.53.

"The court further finds from the admissions and evidence introduced in said cause that the said plaintiffs, John McGarvie and Catherine McGarvie, were partially dependent upon the earnings of the said Peter McGarvie, deceased, and that said partial dependency amounted to 17/22 of the earnings of said deceased, and that said plaintiffs are entitled to recover of and from said defendant 17/22 of $1,581.51, same being $1,225."

Defendant contends that these findings were not supported by the evidence.

The family consisted of the mother, who was housewife, the father, who earned from $95 to $105 per month, one daughter, who earned $95 per month, another daughter, who earned $25 per month, and the deceased son, who earned $528.51 per annum. The son gave all his wages to his mother; that is, he intrusted them to her, and his mother gave him back from time to time what money he desired. The son paid his parents no stipulated amount for his board and lodging, and the father testified that he did not know whether the son gave his mother more than his board and lodging would amount to or not. The mother's testimony was to the same effect. She testified:

"Q. What did he do with his wages at that time? A. Well, gave them to me, always did. * * * Q. And he always made his home with you? A. Yes, sir. Q. And got his meals there? A. Yes, sir. Q. Slept there? A. Yes, sir. Q. Did you do his washing and mending and things of that kind? A. Yes, sir. * * * Q. Now do you know, Mrs. McGarvie, how much he gave you from his wages during the last year of his life? A. No, I don't suppose I could tell what he gave me. He always gave me his wages. Q. Then would he ever take back any of it? A. Yes, sir; if he wanted any, he always came to me and got the money. Q. When he would buy clothes, he would get the money from you? A. Yes, sir; he came to me for his money because he left it with me. * * * Q. He went to places of amusement Yes, sir. Q. And traveled on the street cars and paid those expenses out of his earnings? A. Yes, sir. * * * Q. Did he shave himself or get shaved at a barber shop? A. At the barber shop. Q. How often? A. Well, I think twice a week. Q. And wore good clothes, didn't he? A. Yes, sir; he always wore good clothes. Q. And the money that he left with you there finally, Mrs. McGarvie, would be just about what his board, room, washing, and mending and stuff of that kind would have cost him if he had been boarding?

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A. Well, I don't know. I guess it would, sometimes. Q. And when he was not working and out of employment for any reason his board and his lodging and his washing and his mending went on just the same? A. Just the same. * * * Q. Mrs. McGarvie, what was the habits of your son? Was he in the habit of spending much money? A. No, he isn't much of a saver, but they he wasn't a great spender. He didn't save any; he gave it to me. Q. You got all of his money outside of his actual expenses away from the house? A. Yes, sir. Q. And that, I understand you, wouldn't exceed over $10 or $12 a month? A. Yes, sir. Q. Did he wear good clothes? Did he buy them ready made? He always wore good clothes. Q. Tailor made or ready made? A. Well, sometimes he would have them made, and sometimes bought them at the store. Q. He lived pretty well, didn't he? A. Yes, sir; he did. Q. And has as many of the comforts of life as he could get? A. I guess so. Q. And, Mrs. McGarvie, $10 a month would be about $120 a year. That wouldn't clothe him, would it? A. I didn't say that, whether it would or not. Q. He couldn't get one tailor-made suit for less than $40 or $50, could he? A. No. Q. And then outside of that he was pretty well supplied with clothing, wasn't he? A. Yes, sir. Q. Shirts? Collars? Underwear? Socks? Neckties? Hats? A. Yes, sir. Q. And all those furnishings that a man of his age and his position would naturally want and naturally have? A. Yes, sir."

Whatever was the basis for the trial court's determination that the son contributed 17/22 of his earnings toward the maintenance of his parents we are unable to find any support for it in the evidence. Perhaps there was some small balance of his wages in the hands of the mother which might have been used for plaintiff's support after deducting a fair allowance for the son's board, lodging, and washing, and after deducting an indenfinite but substantial sums returned to the son for his clothing and other expenses; but clearly it could not amount to 17/22 of the money intrusted to the mother by her son. The proof does not show any contribution to his parents' support. The father and mother both frankly admitted they did not know whether the mother's receipts of money from the son ever exceeded a fair estimate for his board and lodging or not. In other words, the plaintiffs wholly failed to prove their partial dependency upon their son for support.

In Smith v. Sash Door Co., 96 Kan. 816, 153 Pac. 533, cited by appellee, there was a positive showing of a substantial contribution by the deceased towards his parents' support. In Fennimore v. Coal Co., 100 Kan. 372, 164 Pac. 265, no question was raised in this court touching the sufficiency of the evidence to prove that the deceased had in fact contributed something tangible and substantial towards his parents' support.

A similar case was Conners v. Public Serv. Elec. Co., 89 N. J. Law, 99, 97 Atl. 792, where the son gave all his wages to his mother, which wages were more than the value of his board and lodging; consequently, that son did in fact contribute something substantial to the support of his parents. Here the difficulty is that the parents themselves with commendable candor admit that they do not know whether their son contributed anything to their support or not. Thus the proof to sustain the finding and judgment fails, and the judgment must be reversed and the cause remanded, with instructions to enter judgment for defendant.

It is so ordered. All the Justices concurring.

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SUPREME JUDICIAL COURT OF MAINE

SCOTT'S CASE.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—FAILURE OF DEPENDENTS.

In a proceeding for compensation under the Workmen's Compensation Act by the deserted wife and also by the mistress of deceased, the fact that the wife was wholly dependent on deceased, and that the illegitimate children of the mistress and deceased were also wholly dependent on him, did not necessitate a disposal of the case under Workmen's Compensation Act, § 13, as though there were no dependents, on the theory that the condition was one not contemplated by the statute.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"DESERTION"—"DEPENDENTS."

A deserted wife, who has subsequent to her desertion been guilty of adultery, is not a "dependent" of her husband, within Rev. St. c. 50, § 1, subd. 8(a); "desertion" under the act having its usual meaning in connection with marital relations.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent; Desertion.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEPENDENTS—ILLEGITIMATE CHILDREN.

Illegitimate children of a decedent are not conclusively presumed to be dependent on him, within Rev. St. c. 50, § 1, subd. 8(c), under the rule, "Expressio unius est exclusio alterius."

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"FAMILY"—"DEPENDENTS."

Illegitimate children of a deceased employee living with decedent and their mother are "dependents" of decedent within Workmen's Compensation Act, as part of his family; a "family" being a collective body of persons who live in one house under a head or manager who has a legal or moral duty to support the members thereof.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Family.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—STATUTES—CONSTRUCTION.

The Workmen's Compensation Act will be construed liberally with a view to carrying out its general purpose and not strictly as other statutes in derogation of the common law.

(For other cases see Master and Servant, Dec. Dig § 348.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The general purpose of the Workmen's Compensation Act is to trans-

* Decision rendered, Nov. 12, 1918. 104 Atl. Rep. 794.

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fer the burdens resulting from industrial accidents from the individual to the industry, to be finally distributed upon society as a whole by compelling the industry through the employer to contribute to the support of those who are lawfully dependent upon deceased for sustenance during his lifetime.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

Appeal from Supreme Judicial Court, Penobscott County, at Law.

Proceedings by Mabel Scott and another under the Workmen's Compensation Act for compensation for the death of Harry Scott, opposed by the Eastern Manufacturing Company, employer, and the American Mutual Liability Company, insurer. From a decree of a single justice in accordance with the findings of the chairman of the Industrial Accident Commission, claimant, Mabel Scott, the employer, and the insurer all appeal. Appeal dismissed, and decree affirmed.

Argued before Cornish, C. J., and Spear, Hanson, Philbrook, Dunn, Morrill, Deasy, and Wilson, JJ.

Harold H. Murchie, of Calais, and Burleigh Martin, of Augusta, for Mabel Scott.

Emery & Waterhouse, of Biddeford, for Eastern Mfg. Co. and American Mut. Liability Co.

Frederick B. Dodd and Lawrence V. Jones, both of Bangor, for defendants.

WILSON, J. This is an appeal from the decree of a single justice in accordance with the findings of the chairman of the Industrial Accident Commission under section 34 of chapter 50, R. S., known as the Workmen's Compensation Act.

On the 24th day of September, 1917, one Harry Scott received an injury while in the employ of the Eastern Manufacturing Company, from which death resulted on the following day. Following his death, two claimants filed petitions with the Industrial Accident Commission claiming to be dependents under the act, viz., Mabel St. Clair Scott, claiming to be the lawful wife of the deceased whom he had deserted, and one by Rachel S. Scott, also claiming to be the wife of the deceased and dependent upon him for her support, but whose claim has been abandoned by counsel. The petition of Rachel S. Scott, however, was later amended to include the minor children of said Rachel S. Scott, viz., Irene F., Stanley W., Harry J., and Donald F., aged ten, seven and four years, and one year and nine months, respectively.

After a hearing, the chairman of the Industrial Commission found from the evidence submitted that Harry Scott received the injury which caused his death in the course of his employment, and that at the time of his injury his "average weekly wage" computed according to subdivision 9 of section 1 of the act was $15 a week, and that his dependents were therefore entitled to $7.50 per week for a period of 300 weeks. So far there seems to be no dispute between the several parties to these proceedings.

The questions raised under this appeal are upon the chairman's rulings as to who the dependents of Harry Scott were at the time of the injury and so entitled to the benefits. Subdivision 8 of section 1 of the Workmen's Compensation Act (chapter 50, R. S.) defines "dependents" as follows:

"'Dependents' shall mean members of the employee's family or next of kin, who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury."

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It then provides that—

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(a) A wife upon a husband with whom she lives, or from whom she was living apart for a justifiable cause, or because he had deserted her or upon whom she is dependent at the time of the accident."

"(c) A child or children, including adopted and step children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living, or upon whom he is or they are dependent at the time of the death of said parent, there being no surviving * * * parent."

Bearing upon the question of dependency, the chairman of the commission, from an agreed statement signed by counsel for all claimants, found the following facts which appear to be undisputed by either the employer or the insurer:

Henry Scott was lawfully married to the claimant Mabel St. Clair Scott February 17, 1901, but deserted her after three years of married life. Since the desertion he has never contributed anything toward her support. One child, Herbert Scott, aged sixteen years, was born of this lawful union. Five years after the desertion, there was born to Mabel St. C. Scott an illegitimate child, Ruth, aged nine years at the time of the hearing.

After the desertion of his wife, Mabel St. C. Scott, Harry Scott, at least ten years before his death, formed an illicit union with one Rachel Somers, who is named in the petition as Rachel S. Scott. The four children named in the petition of Rachel S. Scott the chairman finds from the agreed statement of counsel to be the illegitimate children of Harry Scott and Rachel Somers, and were members of his family, and it appears to be assumed in the agreed statement of counsel and in all the discussion and findings of the chairman that they were all known under the family name of Scott.

Upon these admitted facts the chairman of the commission ruled that the four children of Harry Scott and Rachel Somers Scott were members of his family and his next of kin and were wholly dependent upon him for their support at the time of the injury; that Mabel St. C. Scott was not a member of his family, nor dependent upon him for support; that Rachel S. Scott by reason of the illicit union could not be a dependent under the act; and therefore the four minor illegitimate children of Harry Scott and Rachel S. Scott, being the only dependents, were entitled to all the benefits under the act. From the decree of the justice rendered in accordance with this decision as required under section 34 of chapter 50, R. S., the claimant Mabel St. C. Scott, the employer, and the insurer all appeal. The contentions of the several parties, and we state the facts and contentions of parties at length owing to the questions of first impression raised by this case under the act, are as follows:

1. Mabel St. C. Scott claims that the chairman of the commission erred in ruling that she was not a dependent of Harry Scott at the time of the injury, inasmuch as she was his lawful wife and had been desertd by him, and by the express terms of the statute is conclusively presumed to be wholly dependent upon the deceased husband for her support; that the illegitimate children of Harry Scott were not members of his family or his next of kin, because their father and mother were living together contrary to law, and are not within the purview of subdivision 8 (c) of chapter 50, R. S., which she contends refers only to legitimate, adopted, and step children.

2. Counsel for the illegitimate minor children of Harry Scott and Rachel S. Scott contend that, while they may not be conclusively presumed to be dependent under paragraph (a) of subdivision 8 of section 1 of the act, yet they were members of the family of Harry Scott within

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the meaning of the act, and were as a matter of fact wholly dependent upon him at the time of his death; and that the former wife by her act of adultery had terminated the running of her husband's desertion and had thereby taken herself out of the class conclusively presumed to be dependent and was not at the time of his death a member of his family, or, at least, was not dependent upon him in fact.

[1] 3. Counsel for the employer and insurer join with counsel for each claimant and agree each is correct in his contention, viz., that Mabel St. C. Scott as the lawful deserted wife was wholly dependent upon the deceased, and that the four children of Harry Scott and Rachel S. Scott were also wholly dependent upon him; but that such a condition was not contemplated by the statute, and therefore the case must be disposed of under section 13 of the act as though there were no dependents.

We must reject the contention of counsel for the employer and insurer as wholly contrary to the spirit and "general purpose" of the law. Coakley's Case (216 Mass. 71, 102 N. E. 930, Ann. Cas. 1915A, 867.

[2] We sustain the ruling of the chairman of the commission that Mabel St. C. Scott was not a dependent of Harry Scott at the time of the injury, though not for the reasons assigned by the chairman in his decree. The chairman appears to find that, inasmuch as Mabel St. C. Scott was no longer living with the deceased and was not in fact dependent upon him for support, the conclusive presumption of the statute arising from her marriage to the deceased and his desertion of her is overcome. If there were no other facts in the case than her marriage and his desertion, we think the presumption of her dependency could not be overcome by evidence, but is conclusive. Greenleaf, Ev. (16th Ed.) vol. 1, § 15; Nelson's Case, 217 Mass. 467, 470, 105 N. E. 357, Ann. Cas. 1915C, 862. The fact of whether she was or not actually a member of his family or dependent upon him for support would then be immaterial.

Another fact, however, appears in this case, which we think takes Mabel St. C. Scott out of the class conclusively presumed to be dependent and places her in the class that requires proof, and that is her act of adultery after being deserted by her husband. Her counsel do not deny that by that act she would be precluded from obtaining a divorce on the ground of desertion. We think the word "desertion" as used in this connection has its usual meaning when used in connection with marital relations. Desertion as a ground for divorce must continue up to the time of filing the libel, and involves not only the willful abandonment without just cause, or the consent of the other party, but also the continued refusal to return without justification. If the deserted party at any time furnishes just cause for the one deserting refusing to return, or by his or her acts consents to the separation, desertion as a willful and unjustifiable abandonment of one party by the other and as a ground of divorce ceases. Ford v. Ford, 143 Mass. 577, 10 N. E. 474; Whippen v. Whippen, 147 Mass. 284, 17 N. E. 644. Without a conclusive presumption in her favor, Mabel St. C. Scott, though she was one of the deceased's next of kin, or even if within the meaning of the act was still a member of his family, has no standing in this case, as it is admitted that she was not dependent upon him in fact. Nelson's Case, 217 Mass. 467, 105 N. E. 357, Ann. Cas. 1915C, 862; Newman's Case, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C, 1145; Fierro's Case, 223 Mass. 378, 111 N. E. 957; Veber's Case, 224 Mass. 86, 112 N. E. 485.

It is not necessary to decide whether the illegitimate children of Harry Scott were his next of kin, since, in this case, the only ground upon which it could be claimed that they were his next of kin would be because they had become his heirs under section 3, c. 80 R. S., by being adopted into his family. Morton v. Morton, 62 Neb. 420, 87 N. W. 182. If they were members of his family at the time of his death, for that reason alone, being wholly dependent upon him in fact, they would be entitled to the benefits of the act.

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[3] We do not think that illegitimate children come within the class defined in paragraph (c) of subdivision 8 of section 1 of chapter 50, R. S., and so are conclusively presumed to be dependents of a deceased parent. Notwithstanding the rule of liberal construction expressly enjoined upon those interpreting the act, the application of the familiar rule of construction, "Expressio unius est exclusio alterius," seems to us upon reason and authority to be proper in this instance. Lyon v. Lyon, 88 Me. 395, 34 Atl. 180; Hall v. Cressey, 92 Me. 514, 516, 43 Atl. 118; Bell v. Terry & Tench Co., 177 App. Div. 123, 163 N. Y. Supp. 733.

[4] The determining factor in this case is: Were these illegitimate children members of the family of Harry Scott at the time of his death? We must accept the finding of the chairman of the commission upon this question as to the fact of their living in that relationship; the only question open for this court is whether they may lawfully be considered members of his family within the meaning of the statute. The word "family" is one of elastic and somewhat varied meaning Its meaning in any particular statute is a question of intent and must be determined largely by the purpose of the act and the connection in which it is used; while, as used in wills and expressing relationship, it has a broader meaning. Jacobs v. Prescott, 102 Me. 63, 65 Atl. 761. A common definition of the word in acts granting benefits to members of a "family" is "a collective body of persons who live in one house under a head or manager who has a legal or moral duty to support the members thereof." Fox v. Waterloo Nat. Bank, 126 Iowa, 481, 102 N. W. 424; Sheehy v. Scott, 128 Iowa, 551, 553, 104 N. W. 1139, 4 L. R. A. (N. S.) 365; Holnback v. Wilson, 159 Ill. 148, 42 N. E. 169; Wike Bros. v. Garner, 179 Ill. 257, 259, 53 N. E. 613, 70 Am. St. Rep. 102; Cowden's Case, 225 Mass. 66, 67, 113 N. E. 1036; Robbins v. Railway Co., 100 Me. 496, 506, 62 Atl. 136, 1 L. R. A. (N. S.) 963. There appears to be no question from the statement of facts but that Harry Scott, Rachel S. Scott, and their children were living together in one household of which Harry Scott was the head and manager supporting them. But it is urged, and we think the point is well taken, that they must not be violating any law by so doing. Gordon v. Stewart, 4 Neb. (Unof.) 852, 96 N. W. 624. The violation of law in this case, however, only applies to Harry Scott and Rachel S. Scott, as was recognized in the case last cited; and it was held in Bell v. Keach, 80 Ky. 42, 45, Rutherford v. Mothershed, 42 Tex. Civ. App. 360, 92 S. W. 1021, Lane v. Philips, 69 Tex. 240, 6 S. W. 610, 5 Am. St. Rep. 41, and Roberts v. Whaley, 192 Mich. 133, 158 N. W. 209, L. R. A. 1918A, 189, that there being a natural and moral duty on the part of the father to support his illegitimate children, even though at the time he was living in adultery with the mother, and had a wife living apart, the father and the illegitimate children constitute a household or family entitled to receive the benefits of a Homestead Act, and the illegitimate children were held to be dependents in case of the father's death under the Workmen's Compensation Act of Michigan (Acts Extra Sess. 1912, No. 10) in the cases above cited.

The common law was very harsh in its attitude toward the offspring of unlawful unions. Nearly, if not all, the states, however, have relaxed the rigor of the common-law rule, especially with reference to the rights of the illegitimate child in the property of his or her parents at their death, and, following the more liberal spirit of the civil and canon law, have enacted statutes permitting illegitimate children when the parents intermarry, or when they are publicly acknowledged by the father, to inherit equally from the father and mother and their collateral kindred. Section 3, c. 80, R. S. The natural and moral duty of the father to support and maintain them is generally recognized. Kent, Com. vol. 2, pp. 212-214; Schouler's Dom. Rel. § 279; chapter 102, R. S. Harry Scott was violating no law in fulfilling these natural and moral obligations of caring for and supporting his illegitimate children. The law condemns his

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acts so far as his relations with Rachel Somers were concerned; but, having brought these children into the world, it was his duty to care for them. They are not to blame for their conditions, nor their manner of coming into existence, and, having been recognized by him as his children, the law regards it as his duty to support them, and, having assumed that obligation and maintained them in his household, we think they became members of his family and dependents within the meaning of the Workmen's Compensation Act of this state. Rev. St. c. 50, §§ 1-48.

The Michigan case above cited was decided upon this ground. The father in that case had a wife in an asylum for the insane, by whom he had one daughter who was living apart from him, and to whom he contributed nothing toward her support. He formed an illicit union with his housekeeper, by whom he had two children. The court held, there being no provision in the Michigan statute of conclusive dependency on the part of the wife as in the Maine statute, that the wife was not a dependent, she being supported by the state, that the daughter of the lawful wedlock was not a dependent, inasmuch as he was contributing nothing toward her support. The mistress had, of course, no standing in law and apparently made no claim, but it was held that inasmuch as he had cared for and supported the illegitimate children in his household, and it was his legal and moral duty to support them, that they had a right to expect a continuance of that support had he lived, and that they were therefore members of his family and dependents within the meaning of the Michigan statute.

The case of Bell v. Terry & Tench Co., 177 App. Div. 123, 163 N. Y. Supp. 733, cited by counsel for Mabel St. C. Scott, is not in point contra. The New York statute does not provide for the payment of the death benefits to the dependents and then define dependents as many statutes of this nature do, but stipulates that it shall be paid to the wife with additional compensation to children, if any, under 18 years of age. The court there held that the word "children," which the statute expressly provided included posthumous children and children legally adopted, by the familiar rule of construction above referred to, excluded all illegitimate children. We have already applied the same doctrine to the Maine statute, so far as it is applicable to this case.

[5, 6] It is true that the rights of these children of Harry Scott and Rachel S. Scott are purely statutory, and, unless they can be fairly said to come under its provisions, they cannot take. It is a well-recognized rule of construction of acts of this kind, however, and expressly enjoined upon those whose duty it is to administer this statute, that it shall be construed liberally with a view to carrying out its general purpose, and not strictly as other statutes in derogation of common-law rights usually are, Section 37, c. 50, R. S.; Simmon's Case, 117 Me. 175, 177, 103 Atl. 68. We so construe it. The general purpose of this act undoubtedly is to transfer the burdens resulting from industrial accidents, regardless of who may be at fault from the individual to the industry and finally distribute it upon society as a whole, by compelling the industry, in which the accident occurs, through the employer, to contribute to the support of those who were actually and lawfully dependent upon the deceased for their sustenance during his lifetime. To transfer it in this case from the deceased upon whom these children were actually dependent in his lifetime, and who had lawfully assumed the burden, to this mother, even though she had violated the social canons and the law of the land in producing these offspring, or upon the town in which they may have a pauper residence, is not in accord with the general purpose of this act.

Appeals dismissed with one bill of costs to appellee.

Decree of sitting justice affirmed.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

WORCESTER.

MALLORY'S CASE.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPEAL—RESERVATION OF GROUND OF REVIEW.

Where counsel for the compensation insurer stated before the Industrial Accident Board that he did not wish to raise any question as to the giving of notice of injury, the insurer cannot contend for the first time in the Supreme Judicial Court on appeal that the notice was insufficient.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL—REVIEW OF EVIDENCE.

On appeal from decree of superior court affirming award under Workmen's Compensation Act, Supreme Judicial Court is not concerned with weight of evidence or credibility of witnesses, and findings of fact in report of single member of Accident Board, which were affirmed on review, must stand, unless plainly unwarranted.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT—EVIDENCE.

In proceedings for compensation for death of stock cutter, evidence *held* to sustain finding that injury, cut in big toe from dropping of plank, arose, out of and in course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY AS CAUSE OF DEATH.

Widow, claiming under Compensation Act, not being bound by insurer's evidence, and having presented evidence warranting finding that blow was sufficient to cause conditions found to exist on autopsy, and which caused death, Supreme Judicial Court cannot say as matter of law that the conclusion that the injury was cause of death was error.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Appeal from Superior Court, Worcester County.

Proceedings under the Workmen's Compensation Act by Mrs. Mary A. Mallory for compensation for the death of Edward G. Mallory, the employee, opposed by the J. W. Bishop Company, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was awarded, the award affirmed by the superior court, and from its decree the insurer appeals. Affirmed.

Chas. C. Milton and Frank L. Riley, both of Worcester, for appellant.
Frank B. Hall and John H. Matthews, both of Worcester, for appellee.

BRALEY, J. [1] It is urged that the claim for compensation should be disallowed because it does not appear from the record that any notice of the injury had been given as required by St. 1911, c. 751, pt. 2, §§ 15, 16.

* Decision rendered, Oct. 18, 1918. 120 N. E. Rep. 592.

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But it appears that a notice in writing as required by the statute was actually given to the insurer, the only possible error in which was that the date of the accident is given as of April 18 instead of April 17, and it is unnecessary to consider the effect, if any, of any question of variance, for counsel for the insurer having expressly stated before the Industrial Accident Board that 'he did not wish to raise any question as to the giving of notice of the injury' it cannot when defeated contend for the first time in this court on appeal that the notice was insufficient. Cleveland v. Welsh, 4 Mass. 591; Brown v. Webber, 6 Cush. 560, 563; Dole v. Boutwell, 1 Allen, 286, 287; Oulighan v .Butler, 189 Mass. 287, 75 N. E. 726. The argument for reversal on the merits is that there is no evidence warranting a finding that the deceased employee received an injury in the course of or arising out of his employment and that the finding of the Board having been based on mere conjecture, the decree awarding compensation to the widow must be reversed.

[2, 3] We are not concerned with the weight of evidence or the credibility of witnesses, and the findings of fact in the report of the single member of the Board which were affirmed and adopted on review must stand unless plainly unwarranted. Herrick's Case, 217 Mass 111, 104 N. E. 432. The uncontroverted evidence recited in the report shows that the employee, a stock cutter, while carrying a plank from a pile of lumber in the mill yard to the saw where he worked dropped the plank on his foot, and on his own statements which were admissible, and the evidence of his wife and of the physician who attended him before his removal to the hospital, it properly could be found that the blow injured the big toe of his left foot causing a ragged cut extending perhaps three-quarters of an inch across the base of the nail from which blood oozed.

[4] But, if the finding that the injury arose out of and in the course of his employment is amply sustained, the further finding is that the employee died of septicemia, or blood poisoning. It is upon this finding that the principal contention of the insurer rests, that the injury described was not the cause of the employee's death. It was said in Madden's Case, 222 Mass 487, 495, 111 N. E. 379, 383 (L. R. A. 1916D, 1000):

"The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause."

The narration of his objective symptoms as given by his wife after he returned home on the day of the accident is that both the toe and foot were swollen and—

"turned a purplish red" and the next day "the foot was puffed up, the toe, the foot and leg were puffed up to about the knee. It looked as if it were pressed upon. * * * It was a dark color, a reddish purple, dark red."

The physician who attended him and arranged for his admission to the hospital where he died three days after the injury substantially corroborated the evidence of the widow. It is argued that his injuries were insufficient to cause septicemia, in so brief a period, and the autopsy revealed a septic condition of the left knee with a general septicemia. It is also disclosed that the knee joint which was found to be infiltrated with from three to four ounces of thin pus was the primary seat of the infection. If in connection with these apparently undisputed facts the question of the cause of death rested solely on the medical evidence of the hospital staff, the employee's condition did not arise from the injury as he was then suffering from septic arthritis which had developed general septicemia in his system to which his death was solely attributable The widow and claimant, however, was not conclusively bound by the evidence introduced by the insurer and having presented evidence which warranted a finding that the blow from the plank would be sufficient to cause the septic conditions previously described and which caused his death we cannot say as matter of law that the conclusion was wrong.

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Crowley's Case, 223 Mass. 288, 289, 111 N. E. 786; Madden's Case, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000.

The rulings requested by the insurer were denied rightly and the decree should be affirmed.

Ordered accordingly.

COURT OF APPEALS OF NEW YORK.

TWONKO

v.

ROME BRASS & COPPER CO. et al.

Appeal of AMERICAN MUT. COMPENSATION INS. CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—NOTICE OF CLAIM—WAIVER.

An unauthorized agent, acting for an employer and the insurance carrier, cannot waive Workmen's Compensation Act, § 28, requiring claim for compensation to be filed with the commission within one year, so as to make the waiver binding on the parties to a proceeding to obtain compensation for personal injuries

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ESTOPPEL.

An employer and an insurance carrier under the Workmen's Compensation Act were not estopped to set up that Workmen's Compensation Act, § 28, requiring claim for compensation to be filed with the commission within one year, was not complied with, because the insurance carrier had paid medical bills for the injured employee.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PRESENTATION OF CLAIM—LIMITATIONS.

An injured employee who fails to present a claim for compensation to the commission within one year as required by Workmen's Compensation Act, § 28 is thereafter barred from obtaining compensation for his injuries.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Act by Frank Twonko for compensation for personal injuries, opposed by the Rome Brass & Copper Company, employer, and the American Mutual Compensation Insurance Company, insurance carrier. Award was affirmed by a divided court (183 App. Div. 292, 170 N. Y. Supp. 682), and the employer and insurance carrier appeal. Order reversed.

* Decision rendered, Oct. 15, 1918. 120 N. E. Rep. 638.

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Jeremiah F. Connor, of New York City for appellant American Mut. Compensation Ins Co.

Briggs & Evans, of Rome, for appellant Rome Brass & Copper Co.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent State Industrial Commission.

Michael J. Larkin, of Rome, for respondent Twonko.

CRANE, J. Section 18 of the Workmen's Compensation Law (Consol. Laws, c. 67), as applicable to this case, required notice of the injury to be given to the employer within 10 days after the accident, and by section 28 the right to claim compensation was forever barred unless within one year after the accident the claim for compensation was filed with the commission. Neither of these provisions was complied with. The commission found that the employer was aware of the accident and that neither the employer nor the insurance carrier was prejudiced by the failure to give the notice required by section 18. It may be that there is some evidence to sustain such a finding, but we are of the opinion that there is no legal excuse shown for failure to comply with section 28. The commission found, and the Appellate Division has sustained the finding by a divided court, that the employer and the insurance carrier were estopped from raising this objection. The facts do not justify this conclusoin.

Frank Twonko, while in the employ of the Rome Brass & Copper Company, was injured on July 20, 1914. His claim for compensation was filed with the workmen's compensation commission on September 9, 1915, or 51 days after his right to compensation was barred by the statute. Twonko claimed to have stepped in a hole in the floor, turning his ankle, which thereafter led to serious results. He continued at work for 2 days, and then remained at home for 4 weeks. At the end of this period he returned to work for 3 days, and then remained at home for 5 weeks, when he called a doctor and was taken to the infirmary.

Dr. Reid, who attended him, was apparently anxious about his compensation, as on September 26, 1914, the Rome Brass & Copper Company wrote to Mr. Whilliver, the district manager of the American Mutual Compensation Insurance Company, notifying him of the accident, and stating that Dr. Reid wanted to know about the man's hospital and medical charges. The insurance carrier replied on September 28, 1914, asking particulars regarding the accident. On October 20, 1914, Kenneth Bow, paymaster of the Rome Brass & Copper Company, called at the Rome Infirmary and procured from Frank Twonko a written statement, signed by him, giving the details of his accident and the extent of the injury. On October 23, 1914, a copy of this statement was sent by the employer to the insurance company. Twonko remained in the infirmary until the 6th of January, 1915. The insurance company sent checks to Drs. Reid and Stranahan for their services to Twonko as follows: On November 3, 1914, for $8; on November 14, 1914, for $44; on January 12, 1915, for $10; and on February 6, 1915, for $5; and to the Rome Infirmary a check dated December 7, 1914, for $30, and on January 12, 1915, a check for $31.

Twonko testified:

That at the time he signed the statement of October 20th for Kenneth Bow, he understood that it was a notice to the company of claim for compensation. "Mr. Petz [the interpreter] told me that I was going to get money from the Compensation Insurance Company, and that was the reason I signed the papers."

The witness further says that this was the reason that he gave no further notice. Bow testified:

"We told him that in order to have all the facts, so he would receive his compensation, it would be necessary for him to give us a statement exactly how the accident occurred and the time he laid off."

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[1] These circumstances, together with the fact that Twonko did not speak English, are the basis for the estoppel found by the commission. There is no suggestion that the claim which the law required should be filed with the commission was referred to, or that it was even intimated that it should not be filed. The claimant was obliged to give notice to the employer as well as file a claim with the commission. In his testimony it may be noted that he considered his statement of Octboer 20, 1914, to be a notice to the company, not that he thought it a claim to be filed with the commission. It may be that the claimant knew nothing about the procedure under the Workmen's Compensation Law, but his ignorance cannot weaken its provisions and requirements. They are as binding upon him as upon one fully acquainted with all the privileges and obligations of the act. Even if we assume that Bow undertook to waive for his company and the insurance carrier the provisions of section 28 (which is not the fact), yet he had no authority so to do, and such an attempt would not be binding upon the parties to this proceeding. Dailey v. Stoll, 211 N. Y. 74, 105 N. E. 87.

The claimant had until July 20, 1915, to file his claim with the commission. The last payment by the insurance carrier of any money for his benefit was on February 6, 1915. During a period, therefore, of five months, the claimant knew that he was receiving no money upon his claim or by virtue of his statement given to Bow. The first letter from his lawyer to the commission is dated August 21, 1915.

[2] That the insurance carrier paid the doctors and the infirmary could not amount to estoppel, without some representation by it justifying the claimant in a belief that his claim had been filed or would be filed with the commisison.

[3] The law states that the right to compensation shall be forever barred unless within one year after the accident a claim for compensation shall be filed with the commission. These plain provisions cannot be dispensed with by such evidence as we have in this case. Buckles v. State of New York, 221 N. Y. 418, 117 N. E. 811.

The order of the Appellate Division should be reversed, and the determination of the State Industrial Commission annulled, and claim dismissed, with costs against the Industrial Commission in this court and in the Appellate Division.

Hiscock, C. J., and Chase, Collin, Cuddeback, Hogan, and McLaughlin, JJ., concur.

Order reversed, etc.

SUPREME COURT OF NEW YORK.

SPECIAL TERM, NEW YORK COUNTY.

ROBILOTTO

v.

BARTHOLDI REALTY CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—SERVANT ILLEGALLY EMPLOYED—DEFENSE—DEMURRER.

Action by administrator of boy under 16, employed in violation of Labor Law, § 93, subd. 2, and killed while engaged in employment enumer-

* Decision rendered, September, 1918. 172 N. Y. Supp. 328.

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ated in Workmen's Compensation Law, art. 1, § 2, group 22, brought for benefit of father and next of kin, cannot be maintained; section 11 of latter act providing the exclusive compensation.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

Action by Frank Robilotto, as administrator of Michael Robilotto, deceased, against the Bartholdi Realty Company. Demurrer to defense overruled.

Abraham Rickman, of New York City, for plaintiff.
Frank J. O'Neill, of New York City, for defendant.

McAvoy, J. The plaintiff's intestate, an infant under the age of 16 years, was killed while in the employ of the defendant, by an injury occurring during such service and employment, through the negligence of the defendant. This action is to recover damages in behalf of the father of said infant and his next of kin because of such death by the wrongful act of the defendant, and in answer to the claim for damages there is set forth a defense which alleges that the subject-matter of the action is not within the jurisdiction of the court, because the Workmen's Compensation Law of the state (Consol. Laws, c. 67), which was in full force and effect at the time the plaintiff's intestate is alleged to have sustained the personal injuries resulting in his death, provided the excluisve compensation for such death. Workmen's Compensation Law, § 11. The defense compasses the business carried on by the defendant within the businesses included in the term "hazardous employments"; that is, that the plaintiff's intestate was engaged in the operation of a passenger elevator, which is an employment enumerated in article 1, section 2, group 22, of the present Workmen's Compensation Act. Besides, it is shown and deemed to be true on this demurrer that the defendant has provided for the benefit of the plaintiff, or in the event of death for the next of kin of his intestate, compensation for injury or death therein in one of the methods prescribed by section 50 of the act, and that therefore the exclusive remedy for such wrongful act resulting in death lies within the relief afforded under such Workmen's Compensation Law.

The demurrer goes upon the ground that the employment in which the child was engaged was one prohibited by the public policy of the state declared by the Legislature in section 93 of the Labor Law (Consol. Laws, c. 31), to wit:

"Sec. 93. *Prohibited Employment of Women and Children.* * * * 2. * * * No child under the age of sixteen years shall be employed or permitted to have the care, custody or management of or to operate an elevator either for freight or passengers."

From this basis it is sought to have a holding that the Workmen's Compensation Law is not a remedy to which the infant's next of kin may resort, because the employment contemplated in that act is lawful employment, and as such was not prohibited by express legislative enactment. It is asserted that it would be entirely unreasonable to attribute to the Legislature the intention of providing for compensation for injuries inflicted by an act which it had already prohibited the parties thereto from contracting to make possible. Whether the Workmen's Compensation Law is applicable to an injury resulting from the employment of a person in a capacity in which it is prohibited by law to engage one by reason of sex or infancy has not been determined by our Court of Appeals. The Appellate Division of this court in the Third Department ruled in Ide v. Faul & Timmins (Matter of U. S. Casualty Co). 179 App. Div. 567, 166 N. Y. Supp. 858, that where a claimant was 14 years old and employed in violation of section 93 of the Labor Law, prohibiting the employment of

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a child under the age of 16 years to operate a metal or paper cutting machine, an insurance carrier was not relieved from liability because of a provision contained in its policy providing that only those employees should be covered who were legally employed. Its reasoning is that, because section 2 of the Workmen's Compensation Law is general and provides that it shall be applicable to "employees engaged in the following hazardous employments," and because nothing excluding minors from the benefit of the law is to be found in it or in the Labor Law, no legal deduction can be made that there is such exclusion from the remedies provided for by that act on the ground of any public policy, either declared or implied. The decision is clear to the effect that no defense to the payment of compensation by the employer or carrier to the employee is made out on the ground that the claimant was employed in violation of this provision of the Labor Law.

This holding by the Appellate Division, Third Department, is in direct conflict with the Court of Errors and Appeals of New Jersey (Hetzel v. Wasson Piston Ring Co., 89 N. J. Law, 203, 98 Atl. 306), the Supreme Court of Wisconsin (Stetz v. F. Mayer Boot & Shoe Co., 163 Wis. 151, 156 N. W. 971), and the Supreme Court of Minnesota (Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995), in the decisions of each of which states the logical rule has been applied that employments described in Workmen's Compensation Acts, for injury in which an exclusive remedy is given by such acts, must be deemed to apply solely to employments lawfully made, and that where the employment is violative of prohibitory legislative enactments such remedy is not within the contemplation of the legislative direction. In New Jersey the Compensation Act is quite similar to ours, excepting that it is elective as to both employer and employee, and under it the rule has been declared that the absolute prohibition of employment of a child before he reaches the age of 14 years has the effect of relieving the claimant from the necessity of proceeding for his remedy under the Workmen's Compensation Act, and that the common-law liability for injuries done the child while in such unlawful employment survives. In Wisconsin the ruling is not closely applicable, because in that state's Workmen's Compensation Law there is a provision to the effect that the act shall apply to all contracts for employment, including contracts of employment of minors who are legally permitted to work under the laws of this state. In Minnesota the act has a similar provision, and the statute is made applicable only to minors "who are legally permitted to work under the laws of this state."

We have, therefore, to conclude between the doctrine announced by the highest court of New Jersey and the ruling given in this court of the Appellate Division of another department, and I do not think that the slight distinction between our law and that of New Jersey provides the answer to the disparity of reasoning. Here the design, pursuant to the provisions of the constitutional amendment permitting the Legislature to enact this law, was to avert the consequence of unremedied injury suffered in the course of employment regardless of the contributory negligence or assumption of risk of the claimant It was deemed proper that both employer and employee should be rid of the burden of risk in the hazardous industries, and that the losses in money compensation should be borne by the patrons of the business as a cost of carrying on the enterprise. This policy is patent in every state and federal enactment on this subject of legislation. There is then no difference of policy actuating the difference in rulings. I apprehend that the decision in our jurisdiction is based upon an erroneous premise from which flows the apparently erroneous conclusion that minors prohibited from engaging in employment are included within the provisions of the Workmen's Compensation Act and that therein lies their exclusive remedy. In the Ide Case there are used these words:

"Nothing excluding minors from the benefit of the law is to be found

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in it or in the Labor Law, nor can it be said to exist upon the ground of public policy."

Of course minors are not excluded from the benefits of the law. Minors are specifically mentioned in one part of it as being considered sui juris for certain purposes to be attained under it. Workmen's Compensation Law, section 2, sentence before last paragraph. All the minors over 16 years of age operating elevators would not be excluded from its provisions, but, on the contrary, must be deemed to be included from the general term used. The reasoning in the sentence quoted of the court's opinion relied on by defendant seems to regard the omission of an exclusion of minors who are prohibited from working at certain hazardous occupations from the provisions of the act as an indication that they were to be included within the term "employees." This, with due respect, seems to beg the question. Whatever the ordinary canons of construction impose for the definition of general words, it is now to be decided whether a class prohibited by law from being employed may be deemed as one contemplated as sure to be found in work violative of the prohibition. It seems incredible that the legislative intent can be construed to have gone to the extent of providing for compensation for a class of employees which its solemn commandment had forever forbidden to be engaged in such occupations.

It is reasoned in the cited cases as though it was assumed that this child protective legislation would be ignored, and the Legislature knew that it would be flouted. I am not able to follow this logic, but with the opinion of the Appellate Division, Third Deparment, opposed to these views, before which court come all the primary appeals under the Workmen's Compensation Law from determination ruled upon by the Industrial Commission, which, in the interest of stability and certainty of the law, is not to be lightly disregarded, even though the stare decisis rule is not applicable, I feel bound against making a ruling on judgment independent of the views there announced. It is almost manifest that it will be found that the policy of conserving child life from injury or destruction does not ask that infants protected by this legislation enacted in the Labor Law be confined to the exclusive remedy of the Compensation Act. The evils attendant upon the pleas of contributory negligence, assumption of risk, and the construction of the fellow-servant doctrine are not to be feared in an infant's action, or that of his representative upon an allegation of unlawful employment in a hazardous occupation.

Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811, and Koester v. Rochester Candy Works, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783, point out that as matter of law these defenses do not lie against the declared policy of prohibition of child labor in certain avocations. It would seem surely to be a better policy to negative the right of compensation in employments prohibited as unlawful as a salutary restraint both on parents tending toward their fulfillment of their obligation to keep their children from the proscribed work and on employers as exposing them to the risk of common-law damages for injuries, if sustained by such infants, as to whose engagements law has interposed a barrier. Notwithstanding individual judgment, that remedy is not to be found within the Compensation Act, and an action at common law still survives in these circumstances, I will follow the decision of the Third Department and overrule plaintiff's demurrer to the defense, with motion costs.

Defendant's motion to overrule granted Plaintiff's motion to sustain demurrer is denied. Ordered accordingly.

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SUPREME COURT OF NORTH CAROLINA.

JONES

v.

NORFOLK SOUTHERN R. CO. (No. 257.)*

2. MASTER AND SERVANT—FELLOW-SERVANT RULE.

At common law, or under the later decisions of the common-law courts, negligence of a fellow servant was classed among the risks assumed by an employee engaged in a common service.

(For other cases, see Master and Servant, Dec. Dig. § 216[1].)

3. MASTER AND SERVANT—"FELLOW SERVANTS"—MAKING FLYING SWITCH.

Railroad's locomotive engineer and its brakeman, while engaged in making flying switch with locomotive and car were "fellow servants" within common-law rule as to assumption of risk of negligence of fellow servant.

(For other cases, see Master and Servant, Dec. Dig. § 198[8].)

(For other definitions, see Words and Phrases, First and Second Series, Fellow Servant.)

4. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—CONTROL OF LIABILITY.

In railroad servant's action for injuries under federal Employers' Liability Act, the statute affords controlling rule of liability, and question of assumption of risk of negligence of fellow servant must be determined in accord with provisions of federal statutes and federal decisions construing them.

(For other cases, see Commerce, Dec. Dig. § 8[6].)

5. MASTER AND SERVANT—FELLOW SERVANT—ASSUMPTION OF RISK.

Doctrine of assumption of risk of negligence of fellow servant is based on knowledge, or on fair and reasonable opportunity to know, and usually such knowledge and opportunity must come in time to be of use.

(For other cases, see Master and Servant, Dec. Dig. § 217[29].)

6. MASTER AND SERVANT—ASSUMPTION OF RISK—FEDERAL EMPLOYERS' LIABILITY ACT

Under federal Employers' Liability Act, § 1, brakeman making flying switch, and thrown from car and run over on account of locomotive engineer's sudden, unusual, and unnecessary manner of stopping engine, did not assume risk of such negligence of his fellow servant, having no opportunity to know of danger.

(For other cases, see Master and Servant, Dec. Dig. § 217[5].)

7. NEGLIGENCE—COMPARATIVE NEGLIGENCE—INSTRUCTION.

Where court charged that damages to plaintiff brakeman from defendant railroad must be proportionately reduced if plaintiff was negli-

* Decision rendered, Oct. 23, 1918. 97 S. E. 48.

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gent, his use of the term "full measure of damages," to express correctly rule of adjustment if plaintiff was not negligent, was proper.

(For other cases, see Negligence, Dec. Dig. § 141[12].)

Appeal from Superior Court, Wake County; Ferguson, Judge.

Action by A. V. Jones against the Norfolk Southern Railroad Company. From judgment for plaintiff, defendant appeals. No error.

The action is to recover damages for physical injuries to plaintiff caused by the alleged negligence of defendant company, and the complaint, giving in each the true place and circumstances of the occurrence, states the grievances in two causes of action, in one of which there is direct averment that plaintiff was an employee on defendant's train, engaged at the time as a common carrier of interstate commerce, and a second cause of action without such averment. Defendant having admitted in the answer that the train at the time was engaged in interstate commerce, the action was tried as one under the federal Employers' Liability Act, and on issues presenting the defenses and pleas recognized by that statute. On the hearing, the evidence on the part of plaintiff tended to show that, on the occasion in question, he was an employee on defendant's freight train running from Raleigh, N. C., towards Norfolk, Va., and at or near a station called Simms he was upon a box car, pursuant to orders, in the line of his duty and employment, engaged in making a flying or running switch, by means of which the car was to be placed on the siding at Simms; that the usual method is for the engine to draw the car to a speed required to run the same on the siding of its own momentum; the engine then slows down sufficiently to take up the slack and allow the coupling to be removed, when the engine speeds down the main line allowing the car to run on the side track as designed; that the proper way to do this is to slow down gradually, and there is a special appliance on the engine, called the "Johnson bar," to enable him to do this without any threatening or unusual jolt; that the engine driving the car having reached a speed 10 or 12 miles an hour, "going very fast," by plaintiff's own testimony, the engineer, by the application of direct air or the unusual manner of applying it, brought his engine to a sudden, unusual, and unnecessary stop; that plaintiff, doing what he could to hold himself in place, was thereby thrown upon the track in front of the car and run over, causing the loss of one leg, seriously wounding another, and painfully lacerating other portions of his person. A rule offered by defendants, permitting flying switches to be made, contained, among other things, the admonition: "That great care must be exercised at all times in making any flying switch or in kicking cars." In addition to the rule permitting these flying switches to be made, there was testimony on the part of defendant tending to show that this flying switch was made in the usual way without causing any sudden or unusual jolt, and that plaintiff fell from the car by reason of his own inattention and negligence. On issues submitted, the jury rendered the following verdict:

"Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff by his own negligence contribute to the occurrence of his injuries as alleged in the answer? Answer: No.

"(3) Did the plaintiff assume the risk of the occurrence of the injuries which he sustained and here complained of? Answer: No.

"(4) What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: Seventeen thousand five hundred dollars ($17,500)."

Judgment on the verdict, and defendant excepted and appealed.

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R. N. Simms, of Raleigh, for appellant.
Douglass & Douglass and J. S. Manning, all of Raleigh, for appellee.

HOKE, J. [1] It was chiefly objected to the validity of the trial that his honor refused to hold as a matter of law that plaintiff was barred of recovery by reason of assumption of risk; this on the ground, first, that the making of a flying switch was one of the ordinary incidents of plaintiff's employment; second, that the engineer engaged in making such switch was a fellow servant and, on the facts in evidence, his negligence, if it should be established, should be properly classed as one of the assumed risks in the course of plaintiff's employment. But, in our opinion, neither position can be sustained. The first is closed to defendant by reason of the finding of the jury on the first issue. It is the accepted principle in our procedure that a verdict must be interpreted and allowed significance by proper reference to the testimony and the charge of the court. Reynolds v. Express Co., 172 N. C. 487, 90 S. E. 510, Ann. Cas. 1918C, 1071; Donnell v. Greensboro, 164 N. C. 330, 80 S. E. 377. In the present case, while the complaint seems to specify the "making of the flying switch as a separate act of negligence, a perusal of the evidence and the charge of the court will disclose that the making of the switch itself was not allowed as a ground of liability, but that the considerations and decisions of the first issue were restricted to the question whether there was negligence in making such switch by bringing the engine to an unnecessary and unusual stop"; the language of his honor's direct charge on the first issue being as follows:

"If you should find from the evidence and by the greater weight of the evidence that the engineer suddenly, by use of air brake, or any other appliance, suddenly and unnecessarily checked the speed of the engine in such a manner as to cause an unusual and unnecessary jar sufficient to throw the plaintiff from the car, and he was thrown by reason of that from the car and run over and hurt, you will answer the first issue, 'Yes,' but if you fail to so find you will answer it, 'No.'"

[2-4] The verdict on the first issue, therefore, having eliminated "the making of a flying switch as a ground of liability," that fact as a separate circumstance is "withdrawn from consideration also on the question of assumption of risk." And this, too, is the final answer to the second ground of defendant's objection, though, as argued, this presents other questions that it may be well to consider. At common law or under the later decision of the common-law courts, the negligence of a fellow servant was classed among the risks assumed by an employee engaged in a common service, and, on the facts of this record, the engineer and brakeman are undoubtedly fellow servants within the meaning of the principle. New England R. R. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; B. & O. Ry. v. Baugh, 149 U. S. 369, 13 Sup. Ct. 914, 37 L. Ed. 772. This cause, however, coming under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), it is fully established that the statute itself affords the exclusive and controlling rule of liability, and the question presented must be determined in accordance with its provisions and applicable and authoritative federal decisions construing them. Belch v. Seaboard Air Line, 96 S. E. 640, at the present term, citing Erie R. R. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662; N. Y. Central v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; St. Louis, etc., R. R. v. Hesterly, Adm'r, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

[5, 6] While the law in question clearly recognizes assumption of risk as a defense in certain instances, under section 4 (section 8660) such a position is absolutely inhibited in cases where the violation of a federal

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statute, enacted for the protection of the employees, contributed to the injury or death of employee and, by correct deduction from the terms and meaning of section 1 (section 8657), making railroads engaged as common carriers of interstate commerce liable in damages for injuries or death caused by the negligence of their officers, agents, or employees, the negligence of fellow servants is withdrawn from the class of assumed risks, in cases of unusual and instant negligence and under circumstances which afforded the injured employee no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based upon knowledge of a fair and reasonable opportunity to know, and usually this knowledge and opportunity must "come in time to be of use." 26 Cyc. p. 1202, citing Wright v. Chicago, I. & L. Ry. Co., 160 Ind. 583, 66 N. E. 454. This principle is very generally approved in the cases and text-books on the subject, and in authoritative federal decisions construing the act in question, in reference to the negligence of fellow servants and the incidental assumption of risks, it has been held that the effect of this first section is to place the conduct of fellow servants on the same plane as the employer himself in such cases, and it is fully recognized that an employee does not assume the risks of his employer's negligence unless, as stated, he is given fair opportunity to know and appreciate the risks to which he is thereby subjected. Chesapeake & Ohio Ry. v. De Atley, 241 U. S. 311, 36 Sup. Ct. 564, 60 L. Ed. 1016; Yazoo, etc., Ry. v. Wright, 235 U. S. 376, 35 Sup. Ct. 130, 59 L. Ed. 277; Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed .1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Gila Valley, etc., Ry. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; Texas & Pacific Ry. v. Behymer, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905; 2 Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Grybowski v. Erie R. Co., 88 N. J. Law, 1, 95 Atl. 764; Richey on Fed. Emp. Liability Act, § 59. In Gila Valley Ry. v. Hall, the general position is stated as follows:

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing * * safe * * * appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. * * * In order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear, not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it"

In Chesapeake & Ohio Ry. v. Atley, where an employee was injured in the endeavor to board a moving train in the course of his employment and was injured by the unusual speed of the engine, it was held as follows:

"The Employers' Liability Act abrogated the common-law fellow-servant rule by placing negligence of a coemployee upon the same basis as negligence of the employer. In saving the defense of assumption of risk in cases other than those where the carrier's violation of a statute enacted for the safety of employees contributed to the injury or death, the Employers' Liability Act places a coemployee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk. A railroad employee, having voluntarily entered an employment requiring him on proper occasions to board a moving

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train, assumes the risk normally incident thereto other than such risk as may arise from the failure of the engineer to use due care to operate the train at a moderate rate of speed so as to enable his coemployee to board it without undue peril. Such an employee may presume the engineer will exercise due care for his safety and does not assume the risk attributable to operation at unduly high speed until made aware of danger unless the undue speed and consequent danger are so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger. An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them."

It will be noted that, this was an action under the Employers' Liability Statute and bears with much directness on the facts of the present case. And Yazoo, etc., Ry. v. Wright was also a case under the Employers' liability Act, and holding that no case of assumption of risk was presented when an employee was injured by negligence of the master or fellow servant and the circumstances gave no opportunity to know the danger "in time to be of use." In Railway v. Behymer, supra, a case where an employee had recovered for injuries attributable to an unusual and sudden jerking of a freight train, Associate Justice Holmes, delivering the opinion in affirmance of the judgment below said:

"No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet it can be avoided if necessary, and when the particular and known condition of the train makes a sudden bump, obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as [it] the train did stop, the risk of it was not assumed by plaintiff"—citing Tex. Pac. Ry. v. Archibald, 170 U. S. 665-672, 18 Sup. Ct. 777, 42 L. Ed. 1188.

The case of Boldt v. Railway, 245 U. S. 442, 38 Sup. Ct .139, 62 L. Ed. ——, a decision very much relied on by defendant, does not antagonize the position approved and applied in the cases cited. In Boldt's Case, the intestate of plaintiff, while between cars in a freight yard helping to repair a faulty coupler, was killed by the impact of a string of cars moving by gravity under the control of a brakeman. It was contended that the brakeman negligently permitted the moving cars to strike with too great violence, and that the company failed to promulgate adequate rules on the subject, with evidence to support both claims. There was also evidence tending to show that it was usual to allow the moving cars to strike others that were stationary with force sufficient to make the coupling, etc. On the trial below there was verdict for the company, and on writ of error by plaintiff the single exception insisted on was the refusal of the trial court to give the following instruction asked by him:

"The risk the employee now assumes, since the passing of the federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risks incident to the negligence of the owner's officers, agents, and employees."

In overruling the exceptions, the court, adhering to its former position that the act had the effect of placing the negligence of a fellow servant in the same category as that of the employer's, held that the prayer for instruction was too broadly stated, as the employee as a rule assumed the "extraordinaray risks caused by the master's negligence where they are obvious or fully known and appreciated by him"; but, as will be readily seen, the case gives no support to the position that the employee assumes

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the risks incident to an act of negligence by the employer or fellow servant where no opportunity was afforded to know or appreciate the conditions or its attendant dangers. This being, in our opinion, the correct principle applicable, and the jury, under the charge of the court, having, as stated, established by their verdict on the first and second issues that plaintiff was thrown from the car and run over and injured solely by reason of the sudden, unusual, and unnecessary manner in which the engine and car were stopped by the engineer, an instant act of negligence on his part, we think defendant's motion was properly disallowed, and his honor correctly ruled that, on the facts so established, the defense of assumption of risk was not available to defendant.

It was further objected that his honor gave an erroneous definition of "assumption of risk." The court charged the jury that, if the company was accustomed to make these flying switches and plaintiff to assist in it, he assumed the risk of the incidental dangers, and his general definition of the principle seems to be in accord with the decisions on the subject; but, having restricted the fact of liability on the first issue to the single question whether the engineer made the flying switch negligently by bringing his engine to an unnecessary and unusual and sudden stop, and this having been determined in plaintiff's favor, the court, under the authorities, was justified in the ruling that there could be no assumption of risk, and his definition was without appreciable significance and should not be allowed to affect the result.

[7] It was further insisted that his honor committed prejudicial error in his charge on the question of damages by saying, in certain aspects, the plaintiff should recover the "full measure of damages"; but this exception is without merit. It was used in connection with his honor's instructions in reference to the effect of plaintiff's contributory negligence on the amount of damages. Having charged that the damages must be proportionately reduced in case there was contributory negligence on part of plaintiff, he used the term "full measure" to express correctly the rule of adjustment in case there was no negligent default on plaintiff's part; and it has been held that the term, in any event, does not always constitute reversible error. Texas Ry. v. McCarty, 49 Tex. Civ. App. 532, 108 S. W. 764.

[8] Defendant excepted further to the rulings of the court on questions of evidence: First, that his honor allowed plaintiff to put in evidence a separate clause of section 5 of the answer, as follows:

"That, in order to disconnect the said moving engine and car, it was necessary as a part of said operation to apply air to the engine so as to slow the same down."

And further that he refused to permit defendant to introduce other portions of said answer materially affecting said admissions. In this connection, his honor offered to allow defendant in reply to introduce the accompanying statements of this paragraph, as follows:

"That, pursuant to said purpose, the said engine and cars were proceeding along the track and in the usual and customary manner and the said engine was slowed down and the car uncoupled from said engine."

The defendant declined and, in addition, offered in evidence the entire remaining portion of the paragraph and excepted to the ruling excluding the additional statement.

It is the settled rule of procedure in this jurisdiction that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the rule being further to the effect that, in such case, it is open to the opposing party to introduce such qualifying matter if he so desires. Wade v. Contracting Co., 149 N. C. 177, 62 S. E 919; Sawyer v. Railroad, 145 N. C. 24, 58 S. E. 998, 22 L. R. A. (N. S.) 200; Lewis v. Railroad, 132 N. C.

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382, 43 S. E. 919. A correct application of the principle is in full support of his honor's ruling on both questions. The part of paragraph 5 admitted was of a distinct and separate fact relevant to the issue. His honor offered to allow defendant to introduce in reply any accompanying allegation which could properly be said to qualify or explain the fact, and the additional allegations of the answer insisted on by appellant, averring contributory negligence by plaintiff, were in no sense qualifying or explanatory of the fact admitted and were therefore properly excluded.

[9, 10] It was contended further for error that the court, over the defendant's objection, allowed in evidence the testimony of the witness S. C. Green, a locomotive engineer, as to the customary and proper manner of making these flying switches and the use of the appliances on the engine provided for the purpose. On the argument before us, the objection was urged chiefly on the ground that there had been no preliminary finding by the court that the witness was an expert; but no such objection was made on the trial, nor was the court asked or required to make a finding on the preliminary question. The record shows that there was only a general objection to the evidence of the witness, and this being true, assuming that the testimony of the witness was opinion evidence, and the record showing that the witness was fully qualified as an expert, the presumption is, either that there was a preliminary finding by the court, or that the same had been waived. Lumber Co. v. Railroad, 151 N. C. 217, 220, 65 S. E. 920, citing Britt v. Railroad, 148 N. C. 37, 61 S. E. 601; Summerlin v. Railroad, 133 N. C. 550, 45 S. E. 898. Apart from this and under our decisions, the witness being, as the record shows, qualified by training and experience to express an opinion calculated to aid the jury to a correct conclusion and speaking to the operation and use of engines and appliances exactly similar in structure and operation to that used in the instant case, his estimates and statement of the correct use of such appliances were facts relevant to the issue and properly received in evidence, whether in strictness expert evidence or not. Tire Setter Co. v. Whitehurst, 148 N. C. 446, 62 S. E. 523; Britt v. Railroad, 148 N. C. 37, 61 S. E. 601.

There were other exceptions noted; but, while they have all been duly considered, being without appreciable bearing or significance on the results of the trial, they are not further adverted to.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

SUPREME COURT OF NORTH CAROLINA.

KING

v.

NORFOLK & S. R. CO. (No. 256.)*

1. COMMERCE—"INTERSTATE COMMERCE"—PERSONAL INJURY.

Where a railroad employee at the time of the injury was engaged in repairing a car customarily used and to be then presently used in trains hauling interstate freight, he was engaged in "interstate commerce"

* Decision rendered, Oct. 30, 1918. 97 S. E. Rep. 29.

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within federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[8].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.

3. MASTER AND SERVANT—ASSUMPTION OF RISK—FEDERAL EMPLOYERS' LIABILITY ACT.

In actions under the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665), the common-law doctrine of assumption of risk applies, and as to extraordinary risks and those due to employee's negligence there is no assumption unless the risks are so obvious that an ordinarily prudent man would observe and appreciate them.

(For other cases, see Master and Servant, Dec. Dig. § 204[1].)

Appeal from Superior Court, Wake County; Stacy, Judge.

Action by Furney King against the Norfolk & Southern Railroad Company. Judgment on the verdict for defendant, and plaintiff appeals. Affirmed.

There were facts in evidence on the part of plaintiff tending to show that, on May 15, 1916, while he was engaged as an employee of defendant company, in repairing the drawhead of a caboose on defendant's yard in the city of Raleigh, said caboose being customarily used and to be used with trains hauling interstate freight, he received painful and serious injuries by the drawhead falling on him, this by reason of a defective jack screw, which he was using in the work, negligently furnished him by defendant company or its officers, agents, etc. Defendant answered, denying there was any negligence on its part, and alleging that plaintiff at the time was engaged as an employee of defendant in an act of interstate commerce; that the rights of the parties were governed and controlled by the provisions of the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, §§ 8657-8665), appertaining to these cases, pleaded contributory negligence and assumption of risk, as allowed by the statute, and offered evidence tending to show that plaintiff was engaged at the time in an act of interstate commerce; that he was not injured by a defective jack screw and was not using any such implement at the time, but because, in the endeavor to raise one end of the drawhead, he allowed same to fall on himself. There was evidence also that plaintiff's injuries were not near so serious as he claimed, and that, as a matter of fact, no substantial injury had been inflicted. The cause coming on for trial at said May term, 1918, same commencing May 20th, jury was impaneled and issues framed under the federal Employers' Liability Act and evidence offered by both parties on the issues. At the close of the testimony, plaintiff was allowed by his honor to amend his complaint and allege in definite terms that plaintiff, at the time he was injured, was employed by defendant in interstate commerce. Defendant excepted. On issues submitted, the jury rendered the following verdict:

"Was the plaintiff injured by negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) If so, did the plaintiff by his own negligence contribute to his injuries as alleged in the answer? Answer: Yes.

"(3) At the time of the occurrence in controversy was the defendant a common carrier by railroad engaged in interstate commerce, and was plaintiff employed by the defendant in such interstate commerce? Answer: Yes.

"(4) Did the plaintiff assume the risk of the occurrence of his alleged injuries? Answer: No.

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"(5) What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,500.

"(6) Is the plaintiff's cause of action barred by the two-year statute of limitations? Answer: No."

Judgment on the verdict, and plaintiff excepted and appealed.

Douglass & Douglass, of Raleigh, for appellant.
R. N. Simms, of Raleigh, for appellee.

HOKE, J. [1, 2] The principal exception urged for error was the refusal of the lower court to grant a motion to nonsuit. On the argument before us, it was conceded that there was evidence of negligent default and consequent injury under the Employers' Liability Act sufficient to carry the case to the jury, and the motion to nonsuit was insisted upon on the ground that, in allowing the amendment, which was done on or after May 20th (May 31st), a new cause of action was constituted, to wit, a claim under the Employers' Liability Act, and, this being more than two years after the occurrence, such action would no longer lie. It is expressly provided that an action under the statute will not lie after two years (Belch v. Railroad, 96 S. E. 640, at the present term, and authorities cited), and the question will depend on whether the amendment allowed had the effect of introducing into the record and controversy a separate and distinct cause of action. On that question, a perusal of the pleadings and facts in evidence will disclose that the injury occurred on May 15, 1916; that action having been instituted, on the 16th of December following, plaintiff duly filed his verified complaint, giving his version of the facts, the place and time of the occurrence, and without definite averment that plaintiff, when injured, was engaged in an act of interstate commerce; that on February 27, 1917, or near that time, defendant filed his verified answer denying the negligence and consequent injury, and alleging that the plaintiff, at the time, was engaged in an act of interstate commerce, and the rights and liabilities of parties were controlled by the federal Employers' Liability Act, etc.; setting up further the pleas of contributory negligence and assumption of risk as contemplated and allowed by the statute. On issues joined and without objection, these questions were submitted to the jury, the testimony on both sides showing that plaintiff, at the time of the injury, was engaged in repairing a car, customarily used and to be then presently used in trains hauling interstate freight, under the controlling decisions applicable, clearly a case of interstate commerce. North Carolina R. R. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, and cases cited. And the action having been conducted to that time by both parties as one, under the Employers' Liability Act, at the close of the entire evidence, plaintiff, by leave of the court, was allowed to insert the amendment making definite averment that plaintiff was injured while engaged in interstate commerce. In such case, the state court having concurrent jurisdiction of causes under federal Employers' Liability Act, the parties having, as stated, joined in submitting the issues appropriate to such an action, and the evidence of both sides showing that the act was applicable, we are of opinion that the omission by plaintiff to make definite averment on this question was cured by the allegations of the answer therein, and the treatment of the parties concerning it and the cause could be properly tried and determined as one under the statute without further allegation by the plaintiff. The amendment offered by him was without material significance on the record, being only a formal statement of conditions which the parties had already created and about which there was no dispute. Railroad v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Voelker v. Chicago (C. C.) 116 Fed. 867. The parties are not only concluded by their treatment of the cause as one under the Employers' Liability act, covered by the pleadings

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already filed, but the case we think properly calls for the application of the doctrine of "aider" by the additional and supplemental averments in the adversary pleadings by which a defective statement may be supplied, a doctrine that prevails both in the Code and common-law principles of pleading, is recognized both in federal and state procedure and in this jurisdiction, and the better considered decisions elsewhere extends to omissions in matters of substance as well as to other defects. Whitley v. Railroad, 119 N. C. 724, 25 S. E. 1018; Knowles v. Railroad, 102 N. C. 59, 9 S. E. 7; Garrett v. Trotter, 65 N. C. 430; Clark's Code (3d Ed.) p. 232; U. S. v. Morris, 23 U. S. (10 Wheat.) 246, 6 L. Ed. 314; Slack v. Lyon, 9 Pick. (Mass.) 62; Shively v. Water Co., 99 Cal. 259, 33 Pac. 848; Bliss on Code Pleading (3d Ed.) § 437; Pomeroy's Remedies and Remedial Rights, § 579.

In Renn v. Railroad, 170 N. C. 129, 86 S. E. 964, it was held that, under our state procedure, an amendment of this kind, in any event, relates back to the institution of the suit. On writ of error, this decision was affirmed by the Supreme Court of the United States (241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006), and, while that court held that such an amendment might very well present a federal question, there is nothing in the case, as we understand it, which, on the facts of the present record, forbids the disposition we make of defendant's appeal. And in Union Pac. R. R. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, a case very much relied on by defendant, plaintiff sued in a Missouri court for an injury occurring in the state of Kansas, setting forth a common-law action for injury by reason of an incompetent fellow servant, knowingly retained by the employer. After the lapse of sufficient time to bar recovery, both under the Missouri and Kansas statutes, plaintiff amended his pleading and declared on a statute of the state of Kansas (required to be pleaded), making employers liable for negligent default of fellow servants, and it was held that such an amendment introduced an entirely new cause of action and the statute of limitations was available as a defense. In delivering the opinion, Chief Justice White, then Associate Justice, said, in effect, that such an amendment was not only a change from "fact to fact, but from law to law," and was an entire departure from the cause of action as originally constituted; but, in our case, there is no necessity to plead the statute; on the facts as shown in evidence by both parties, it prevails as the law of the case. Voelker v. Chicago R. R., supra. And plaintiff, as heretofore shown, having alleged the circumstances of the occurrence, omiting definite statement as to whether he was at the time of the injury engaged in an act of interstate commerce, defendant answers, making full statement of that fact, and the parties acting under such pleas join issue and proceed to try the cause under the statute, and we think the omission in the complaint is thereby cured. The case of Fleming v. Railroad, 160 N. C. 196, 76 S. E. 212, is in no way opposed to the position. In that case, the pleadings as interpreted by the court contained definite averment that plaintiff at the time of the injury was an employee on an intrastate train, and, this being admitted in the answer, it was held that the parties were precluded from showing facts in evidence contrary to their admission; the case bearing little or no resemblance to the facts of the present appeal. And Kinney v. Railroad Co. (Sup.) 166 N. Y. Supp. 868, and Ft. Worth v. Bird (Tex. Civ. App.) 196 S. W. 597, to which we were also cited, were two causes, the first prosecuted through two trials as an action under the common law and statutes of New York, and the second, as an action under a Texas statute and till after two years when an amendment then made, setting forth for the first time a cause of action under federal Employers' Liability Act, was held to introduce a new cause of action, barred by the lapse of two years as that statute provides; but we find nothing in either case or record which tended to show a waiver of the position by the parties or which

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called for or permiteed application of the doctrine of "aider," which we have held to be the controlling features of the present appeal.

[3] Defendant further excepted to the position of his honor's charge as to assumption of risk in terms as follows:

"That issue bears upon the defendant's plea of assumption of risk. Under the federal Empoyers' Liability Act, the common-law doctrine that employees assume the risks, dangers, and hazards normally incident to the business, still obtains. It is pleaded by the defendant in this case, and the defendant has the burden of proof on that. The rule is that the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks, and those due to the employer's negligence, he does not assume until made aware of them or until they become so obvious and immediately dangerous that an ordinarily prudent man would observe and appreciate them; in either or both of which cases he does assume them, if he continue in the employment, without objection, or without obtaining from the employer an assurance that the matter will be remedied"—a definition that accords with the controlling decisions on the subject. Chesapeake & Ohio Railroad v. De Atley, 241 U S. 311, 36 Sup. Ct. 564, 60 L. Ed. 1016; Gila Valley Railroad v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521.

Under the principles embodied in that statement, the question was correctly and fairly submitted to the jury, and they have determined the issue against defendant.

Again, it was contended that there was error committed in his honor's charge on the question of damages in allowing the jury to consider the loss of mental powers when there was no evidence tending to show such loss; but the objection is not open to defendant, for, conceding that his honor's charge is correctly interpreted in the exception, we find abundant evidence in the record as to the effect of the injury to justify and uphold the position.

In reference to the sixth issue, as to the bar by lapse of two years, having held that plaintiff's cause of action under the statute was covered by the original pleadings, all filed within the time, (1) because the parties had elected so to treat it, and in such case a change of front is not permissible, either in federal or state preocedure (Railway v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Lindsey v. Mitchell, 174 N C. 458, 93 S. E. 955; Brown v. Chemical Co., 165 N. C. 421, 81 S. E. 463), and (2) because the omission in the complaint to allege that plaintiff was engaged in an act of interstate commerce is aided or cured by the full averments of the answer in that respect, his honor correctly ruled that, on the record and facts in evidence, if believed, the action was not barred by lapse of time.

On careful perusal of the record, we find no error to appellant's prejudice, and the judgment must be affirmed.

No error.

SUPERIOR COURT OF PENNSYLVANIA.

GURSKI

v.

SUSQUEHANNA COAL CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENT—"COURSE OF EMPLOYMENT."

Where a miner, going to get tools in a part of the mine where he was told not to go, died from noxious gases, he died as the result of an

* Decision rendered, June 11, 1918. 104 Atl. Rep. 801.

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accident occurring "in the course of his employment," within Workmen's Compensation Act, § 301.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE.

Where a question arises as to whether an accident from which a workman dies occurred in the course of his employment, the findings of fact by the compensation referee should be so explicit as to state the full circumstances thereof.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF COMPENSATION BOARD.

Where the Workmen's Compensation Board finds facts additional to those stated by the refereee, and their correctness is conceded, the Supreme Court may determine the issue upon the facts so found.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from Court of Common Pleas, Luzerne County.

Proceeding under Workmen's Compensation Act by Julia Gurski against the Susquehanna Coal Company. Finding of referee for claimant reversed by Workmen's Compensation Board, but affirmed upon appeal to common pleas court, and the employer appeals. Affirmed.

Argued before Brown, C. J., and Mochzisker, Frazer, Walling, and Simpson, JJ.

H. A. Gordon, and A. L. Williams, both of Wilkes-Barre, for appellant.

Rush Trescott and Roger J. Dever, both of Wilkes-Barre, for appellee.

MOSCHZISKER, J. This is a case under the act of June 2, 1915 (P. L. 736). Plaintiff, widow of Frank Gurski, claimed compensation for the death of her husband; the referee found in her favor; the Workmen's Compensaion Board reversed; an appeal was taken to the common pleas of Luzerne county, which tribunal reversed the board and affirmed the referee; the defendant employer has appealed to this court.

On October 19, 1916, Frank Gurski, a contract miner in the employ of defendant company died from inhaling noxious gases, which had accumulated in a portion of the latter's mine. The part of the mine infected by these gases was closed off, marked "danger," and all workmen, including plaintiff's husband, were notified not to enter therein. Gurski, who worked in the gaseous section of the mine prior to the time it was closed off, had left "his mining machine, and possibly some other tools, there." About two months subsequent, when engaged in another part of the mine, "at a point 2,600 feet from his former place" of employment, "in the course of his work, he had occasion to use a mining machine, * * * and * * * expressed himself to his fellow workmen that he would go in for his tools to the former working place." On the morning of the accident, Gurski had been notified not to go into the fenced off portion of the mine; but, "notwithstanding these positive directions and the danger marks on the door and fences, he and his helper went to the place where he had been working [previously], with the declared intention of getting his machine and other tools"; and he died as the result of so doing.

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We have taken the above matter from the opinion of Commissioner Scott, of the Compensation Board, as did the court below; and, on the facts stated, it appears that plaintiff's husband met his death by reason of the harmful condition of his employer's premises, while on his way to fetch tools with which to work—in other words, while he was upon the premises of his employer and acting in furtherance of the latter's business.

[1] We agree with the learned court below that Gurski died from an accident which occurred in the course of his employment, within the meaning of the act of 1915, supra, and that, "though the orders, not to go into the blocked-off portion of the mine, may have been fully understood and appreciated by him [his departure therefrom] would be but a negligent act on his part"—which does not bar the present claim for compensation. Section 301, Act of 1915, supra (page 738); Lane v. Horn & Hardart Baking Co., 261 Pa. 329, 104 Atl. 615.

[2 3] In cases of this character, the referee should make his findings of fact so comprehensive and explicit as to disclose the full story of the accident. Here the referee's findings are too meager, and, since no hearing de novo was held by the Compensation Board, that body, strictly speaking, should not have found facts in addition to those stated by its subordinate officer, the referee (McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617); but this point was not urged in the court below and is not raised here. Moreover, it appears that all parties concede "the correctness of the statement of facts contained in the opinion of Commissioner Scott," and that "the facts of the case are not in dispute"; therefore we finally determine the issues involved upon such conceded facts.

The assignments of error are overruled, and the judgment is affirmed.

COURT OF CIVIL APPEALS OF TEXAS.

BEAUMONT.

KIRBY LUMBER CO.

v.

McGILBERRY et al. (No 347.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—RELATION OF PARTIES—"EMPLOYEE."

Where contract provided that buyer of timber should reimburse seller for wages paid scalers, not to exceed $50 per month each, a scaler employed by, and who worked under direction of, seller, at a salary of $70 a month, was not an employee of buyer, within Workmen's Compensation Act, arts. 5246h, 5246yyy.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from District Court, Harris County; J. D. Harvey, Judge.

Action by Valeria McGilberry and others against Kirby Lumber Company. Judgment for plaintiffs, and defendant appeals. Reversed and rendered.

* Decision rendered, July 11, 1918. Rehearing denied, Oct. 16, 1918. 205 S. W. Rep. 835.

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Andrews, Streetman, Burns & Logue and W. L. Cook, all of Houston, for appellant.

Hutcheson & Bryan, of Houston, for appellees.

HIGHTOWER, C. J. This was a suit by the surviving wife and children of one Sanford McGilberry, deceased, as plaintiffs, to recover damages against the Kirby Lumber Company, said plaintiffs contending that the death of Sanford McGilberry was caused by negligence on the part of the servants and agents of said Kirby Lumber Company. The cause was tried with a jury in the court below, and was submitted upon special issues, all of which were answered by the jury, and upon the verdict so returned the trial court entered judgment in favor of plaintiffs in the sum of $7,495, with interest thereon at the legal rate from the date of the judgment.

When the verdict was returned the defendant, Kirby Lumber Company, filed a motion praying the court to enter judgment in its favor upon the verdict of the jury, which motion was overruled, and to this action of the court said defendant duly excepted.

After the motion for judgment was overruled, and after judgment was entered in favor of plaintiffs, as before stated, defendant filed a motion for a new trial, which was also overruled and exception duly taken, and the cause has been properly brought here, by appeal on the part of the Kirby Lumber Company, for review.

In the amended original petition of the appellees, and upon which the case proceeded to trial, it was alleged, substantially, that Sanford McGilberry met his death as the result of a tree being felled upon him by employees of appellant, Kirby Lumber Company. It was alleged that McGilberry, at the time of his death, was an employee connected with logging operations being carried on by appellant in the vicinity where the accident occurred; that by virtue of certain contractual relations between the Kirby Lumber Company, appellant, and the Houston Oil Company of Texas, McGilberry was constituted an employee of the Kirby Lumber Company in the work he was doing, which was scaling logs or timber; but, in the alternative, that, if McGilberry was not in fact an employee of the Kirby Lumber Company, nevertheless he was entitled to that degree of care which would be owing to an employee of said Kirby Lumber Company by reason of the character of the work he was doing. It was alleged, substantially, that a short time prior to the noon hour on the day he was injured McGilberry went to a point near a red heart log, which he expected later to be called upon to scale, and that shortly thereafter he lay down and went to sleep, and that while he was asleep certain employees of the Kirby Lumber Company, known as sawyers, negligently felled a tree upon him, which caused his death. The specific grounds of negligence alleged on the part of said Kirby Lumber Company sawyers were as follows: (a) In carelessly and negligently permitting the tree which they were sawing to fall upon McGilberry; (b) in permitting McGilberry to remain in the position he was while the tree was being felled, and in felling the tree while he was in that position; (c) negligence in failing to give a warning shout or signal before the tree was felled in order to give McGilberry time to escape; (d) negligence in failing to inspect the radius of the tree about to be felled with special reference to the direction in which it was being bedded to fall, in order to determine whether or not any person might be in danger. The plaintiffs laid their damages in the sum of $15,000, and prayed for recovery in that amount.

Appellant, Kirby Lumber Company, answered by general demurrer, special exceptions, general denial, and also by a special plea of contributory negligence on the part of Sanford McGilberry in lying down and going to sleep where he was at the time he was struck and killed by the falling tree.

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By a supplemental petition appellees alleged that the Kirby Lumber Company was not a subscriber under the Texas Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), and that, because of the relation of McGilberry to the work being done, plaintiffs were entitled to the benefits of said statute, which, among other things, abolishes contributory negligence as a complete defense in bar in cases covered by its provisions.

The jury found, in answer to one of the special issues submitted, that the sawyers, who were servants of the Kirby Lumber Company, and who felled the tree which killed McGilberry, were guilty of negligence, in that they failed to inspect the radius of the tree which was about to be felled by them, and before it was felled, with special reference to the direction in which it was being bedded to fall, in order to determine whether or not any person might be in danger of being struck and injured by such tree, and also, further, that this negligence was a proximate cause of the death of said McGilberry. The jury also found, however, that said servants of the Kirby Lumber Company did give the usual and customary warning or signal before said tree was felled, and that such warning or signal was given in time, had it been heeded, to permit McGilberry to escape. The jury also found, affirmatively, in answer to a properly submitted special issue, that McGilberry was guilty of contributory negligence in lying down and being asleep where he was at the time he was killed.

Appellant, Kirby Lumber Company, in its brief presents a number of assignments of error, and these assignments together raise three principal questions. The first assignment has reference to the refusal of the trial court to enter judgment in favor of appellant upon its motion therefor; and the second assignment challenges the action of the trial court in refusing to peremptorily instruct the jury to return a verdict in favor of appellant; and the third assignment complains of the refusal of the trial court to admit in evidence testimony of certain witnesses tendered by appellant for the purpose of showing that McGilberry was an employee of the Houston Oil Company of Texas at the time of his death, and was not an employee of appellant, Kirby Lumber Company.

Now, if appellant's first assignment of error, complaining of the action of the trial court in refusing to enter judgment in favor of appellant upon the jury's verdict, should be sustained, then a consideration of any of the other assignments would be uncalled and unnecessary. It is without dispute in the record that Sanford McGilberry was what is known in sawmill parlance as a log scaler or timber scaler, and at the time of his death was engaged in that occupation, and was scaling logs which were being cut under a contract between the Houston Oil Company of Texas and the Kirby Lumber Company. The Houston Oil Company of Texas was the seller of the timber being so scaled, and the Kirby Lumber Company was the purchaser thereof. The written contract between the Houston Oil Company of Texas and appellant, Kirby Lumber Company, was introduced in evidence on the trial below, and is fully shown in the record before us; but, after a careful inspection and consideration of this contract, we conclude that paragraphs 3 and 5 thereof are the only provisions in the contract that could possibly have any reference to the material question under this assignment, which question is this: Was Sanford McGilberry, at the time he was injured and killed, an employee of the Kirby Lumber Company? Paragraph 3 of said contract reads as follows:

"Said timber shall be scaled when loaded on the cars of the party of the second part (Kirby Lumber Company) or at the skidways in the woods, or at the mills, or elsewhere, as directed by the party of the first part (Houston Oil Company of Texas), and said party of the first part (Houston Oil Company of Texas) may appoint such scalers as it may deem requisite, whose duty it shall be to scale and measure such timber. The party of the second part (Kirby Lumber Company) shall reimburse

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the party of the first part (Houston Oil Company of Texas) for the wages of such scalers, not to exceed fifty dollars ($50.00) per month each. Monthly reports shall be made in duplicate by such scalers to the parties hereto and settlements hereunder shall be made and based thereon."

The fifth paragraph reads as follows:

"Said timber shall be cut in a careful and prudent way, and the trees felled shall be so felled as to preserve the young timber and avoid abuse and injury to such young timber and saplings, and no trees under twelve (12) inches in diameter shall be cut from said lands for timber skids or other purposes"

There is no brief on file in this court for the appellees, but the case was orally argued by counsel for appellees, and at the argument we gathered that it was the contention of counsel for appellees that the provisions of the written contract just above quoted, and especially paragraph 3 thereof, had the effect to constitute and make Sanford McGilberry an employee of the Kirby Lumber Company, mainly for the reason that it was provided in paragraph 3, as above quoted, that the Houston Oil Company of Texas was to be reimbursed by the Kirby Lumber Company, not to exceed $50 each per month, for wages paid by the Houston Oil Company of Texas to its log scalers. In other words, it seemed to be the contention of counsel for appellees that, because of the provisions in said paragraph 3 of the contract, the Kirby Lumber Company bound itself to reimburse the Houston Oil Company of Texas in a sum not to exceed $50 per month for each log scaler employed by the Houston Oil Company, that such provision of itself had the effect to make Sanford McGilberry an employee of the Kirby Lumber Company, and that the said McGilberry was an employee of the Kirby Lumber Company, as defined by the Texas Workmen's Compensation Act, which was in force at the time McGilberry met his death.

According to the undisputed evidence introduced on the trial below, Sanford McGilberry had been selected and employed by the Houston Oil Company of Texas to scale timber sold by said company to the Kirby Lumber Company, and the Houston Oil Company, in consideration for his services in that capacity, regularly paid to McGilberry $70 per month, and his name was carried upon the payroll of the Houston Oil Company of Texas as its employee in the capacity of log scaler It was also shown, without dispute in the record, that the Kirby Lumber Company had nothing to do with the selection or employment of Sanford McGilberry, and that the Kirby Lumber Company had or exercised no control or direction whatever over said McGilberry in the discharge of his duties as log scaler for the Houston Oil Company, and had no right to direct or control him in the discharge of his duties as such scaler, and had no right to discharge him; but, on the contrary, it was affirmatively shown that the Houston Oil Company of Texas alone selected and employed the said McGilberry, and that he was under the direction and control of the Houston Oil Company of Texas in the discharge of his duties as log scaler, and that said company alone had the right to discharge him. In this connection we quote, because it is clear and readily understood, the testimony of Oswald S. Parker, a witness sworn in behalf of appellant, as follows:

"I live in Houston. My profession is that of a lawyer. My office is on the ninth floor of the Scanlan building. My partner is Judge T. M. Kennerly. My partner and I are joint attorneys for the Houston Oil Company of Texas. We have been engaged in that capacity for three years. We were so engaged in July, 1914. I think I am familiar with all of the agreements between the Houston Oil Company and the Kirby Lumber Company, as affecting the matter of scaling.

"The instrument handed me by counsel (meaning the contract between the Kirby Lumber Company and the Houston Oil Company) pur-

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ports to be a contract of 1901 between the Houston Oil Company of Texas and John H. Kirby; that contract is still in force as construed, and in some respects, I believe, modified, by the decree of the United States District Court for the Southern District of Texas, which has become a part of the contract between the parties, but I see nothing in this paragraph 3, as I recall, that has been changed in any manner. This is the decree of July 8, 1908, that I refer to. Except so far as it is modified by this decree, this contract is in force.

"I certainly am acquainted with the practical workings of the parties under the contract, so far as the Houston Oil Company is concerned in respect to the scalers. Under the decree it employs what are known as contract scalers, composed of a chief scaler, who is an employee of the Houston Oil Company of Texas, and certain scalers working under him, who actually scale the timber. These scalers scale the timber before it is moved from where it is felled in the woods, make out triplicate reports, send one to the Houston Oil Company of Texas, at Houston, for its records, to furnish the basis of the charge against the Kirby Lumber Company for the timber cut, and send a duplicate to the Kirby Lumber Company by the same manner, so they can check against our charge statement and keep the third copy for reference. The Houston Oil Company of Texas has the exclusive right to discharge these men. We do not allow the Kirby Lumber Company to interfere with them in any way; these men are upon the pay roll of the Houston Oil Company of Texas, and they receive their pay from that company. As to other scalers working in the employment of the Kirby Lumber Company, at times only, the Kirby Lumber Company has employed its own scalers to work opposite these Houston Oil Company scalers, in order to check their work, and see if the Kirby Lumber Company had any objection to the method of scaling carried on by our scalers. Sometimes they have made objections, and they have been taken up and thrashed out, but the scalers employed by the Kirby Lumber Company are merely what is known as check scalers, who have nothing to do with the reports, and have nothing to do with the basis on which the charges are made. Our scalers are entirely independent of the Kirby Lumber Company, and we have nothing to do with them."

On cross-examination he further testified:

"There is a check scaler which the Houston Oil Company employs entirely independent of the scalers of the Kirby Lumber Company, which I have referred to. The Houston Oil Company of Texas employs certain traveling scalers who go from place to place and check the work of other scalers. They are included in the contract, according to our construction. The Kirby Lumber Company does not pay these scalers that I have just referred to. They do, under the contract and decree, contribute to the Houston Oil Company of Texas, a certain amount, which is supposed to reimburse for a part of the cost of having the timber scaled; but the authority to do it, and the duty to have it done and to employ scalers, is all on the Houston Oil Company of Texas. As to the reimbursement being for the scalers I have just referred to, I will say that I know what counsel is referring to; that is, in section 3, where it says that the party of the second part, Kirby Lumber Company, shall reimburse party of the first part, Houston Oil Company, for the wages of such scalers, not to exceed $50 per month each. That is done even to this time, but it is paid direct under that to the Houston Oil Company of Texas."

There is no contention, in so far as is disclosed by the record before us, that appellant, Kirby Lumber Company, ever claimed the right to exercise, or ever, in fact, exercised, any direction or control whatever over log scalers employed by the Houston Oil Company, nor is there any contention on the part of appellees that the Kirby Lumber Company had the right to employ or discharge any of the scalers for the Houston Oil Com-

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pany, but, as stated above, it seemed in the record to be the contention of counsel for appellees that the provision in the contract between the Houston Oil Company and the Kirby Lumber Company for reimbursement for part of the wages paid scalers by the Houston Oil Company had the effect to constitute McGilberry an employee of the Kirby Lumber Company.

In view of the finding by the jury that Sanford McGilberry was himself guilty of negligence which contributed to his death, the appellees were not entitled to a judgment in their favor, notwithstanding the jury also found that the servants of the Kirby Lumber Company, who felled the tree which killed McGilberry, were guilty of negligence, unless McGilberry was an employee of the Kirby Lumber Company at the time of his death, and sustained the injuries which resulted in his death in the course of his employment. It was admitted upon the trial below that the Kirby Lumber Company was not a subscriber under the provisions of the Workmen's Compensation Act of this state, but whether the Houston Oil Company of Texas was such subscriber does not appear from the record.

Section 1 of the Texas Workmen's Compensation Act (Acts 33d Leg. c. 179) reads as follows:

"In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employee was guilty of contributory negligence; but in such event the damages shall be diminished in the proportion to the amount of negligence attributable to such employee."

"Employee" is defined in the act as follows:

"'Employee' shall include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of the employer"

Now, if Sanford McGilberry, at the time of his death, was not in the service of the Kirby Lumber Company under a contract of hire, express or implied, oral or written, then he was not an employee of the Kirby Lumber Company at the time of his death, and the Workmen's Compensation Act of this state cannot be applied and cannot affect the liability of the Kirby Lumber Company for the death of Sanford McGilberry, but the liability of the Kirby Lumber Company in such event must depend upon the law as it was prior to the passage of that act by the Legislature of this state; and under the law as it obtained prior to that act, and still obtains as to all persons not affected by that act, McGilberry's negligence, as found by the jury, constituted an absolute defense in bar of any recovery by the appellees in this case.

[1] And since it affirmatively appears, without dispute, from the record before us, that Sanford McGilberry was selected and employed by the Houston Oil Company of Texas; that he was carried on the pay roll of the Houston Oil Company of Texas as its employee; that his wages were paid to him by the Houston Oil Company of Texas; that the Houston Oil Company alone had the right to direct and control the said McGilberry in the discharge of his duties as log scaler and the right to discharge him; and that the Kirby Lumber Company, appellant, had no such right to employ, direct, control, or discharge the said McGilberry—we are of the opinion that the said Sanford McGilberry was not, at the time of his death, an employee of the Kirby Lumber Company, but was an employee of the Houston Oil Company of Texas, notwithstanding the provision as contained in paragraph 3 of the contract between said companies to the effect that the Kirby Lumber Company would reimburse the Houston Oil Company for wages paid timber scalers by said last-named company, not to exceed $50 per month each. It is clear from the provisions of the contract between said companies, that the presence of Mc-

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Gilberry at the place where he met his death was for the purpose of protecting the interests of the Houston Oil Company of Texas in the sale of its timber to the Kirby Lumber Company; that is to say, it was the purpose of the Houston Oil Company in having him there to see that its interests were properly protected as against the Kirby Lumber Company, in felling and taking its timber, and this, doubtless, was the reason for the provision in the contract, as shown above, that the Houston Oil Company, the seller of the timber, should have the right to select and employ its own scalers, and not have to depend upon such reports as the Kirby Lumber Company might furnish to it in that connection. There was no contract of employment of McGilberry by the Kirby Lumber Company either written or oral, express or implied, as shown by the undisputed record in this case, and therefore he was not an employee of the Kirby Lumber Company, as defined by the Workmen's Compensation Act of this state, as above quoted. Wallace v. Cotton Oil Co., 91 Tex. 21, 40 S. W. 399; Cunningham v. Moore et al., 55 Tex. 377, 40 Am. Rep. 812; Cunningham v. Ry. Co., 51 Tex. 510, 32 Am. Dec. 632; Honnold on Workmen's Compensation, c. 4, §§ 49, 51, 58, and 66; Vernon's Sayles' Civil Statutes 1914, arts. 5246h and 5246yyy.

[2] Having reached the conclusion that Sanford McGilberry was not an employee of the Kirby Lumber Company at the time of his death, within the provisions of the Workmen's Compensation Act of this state, it follows that we must hold that the finding by the jury that said McGilberry was guilty of negligence which proximately contributed to his death, which finding is not questioned by the appellees in this case, and which is abundantly supported by the evidence, entitled appellant, Kirby Lumber Company, to a judgment in its favor, and the trial court should have granted appellant's motion therefor; and, because of the trial court's error in refusing to do so, its judgment is reversed, and judgment will be here rendered, upon the verdict of the jury, that appellees take nothing by their suit, and that appellant recover all costs by it expended.

Reversed and rendered.

SUPREME COURT OF WASHINGTON.

MORRISON

v.

CHICAGO, M. & ST. P. RY. CO. (No. 14428.)*

1. COMMERCE—"INTERSTATE COMMERCE"—RAILROAD EMPLOYEES.

The test as to whether an employee was engaged in "interstate commerce" at the time of his injury is whether the performance of the act in which he was engaged directly and immediately tended to facilitate the movement of interstate commerce, or, conversely, whether failure to perform the act directly and immediately interfered with or hindered the movement of such commerce.

(For other cases, see Commerce, Dec. Dig. § 27[5].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

* Decision rendered, Oct. 1, 1918. 175 Pac. Rep. 325.

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2. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—ACTION—"INTERSTATE COMMERCE."

The foreman of a bridge gang, killed in a collision while riding on a gasoline car after unloading concrete tiles to be used in the future in replacing wooden culverts in a railroad track, was not engaged in "interstate commerce" within the federal Employers' Liability Act (U. S. Comp. 1916, §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[8].)

3. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—INTERSTATE SHIPMENTS—"INTERSTATE COMMERCE."

The fact that concrete tiling to be used in replacing wooden culverts in a railroad track had been shipped from another state did not impress it with an interstate character so as to make the unloading thereof shortly after its arrival a part of interstate transportation within the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[5].)

Holcomb, J., dissenting.

En. Banc. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Maud Morrison administratrix of the estate of Jean Morrison, deceased, against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

Geo. W. Korte, of Seattle, and Cullen, Lee & Matthews, of Spokane, for Appellant.

Plummer & Lavin and H. G. Kinzel, all of Spokane, for respondent.

CHADWICK, J. This action was brought by Maud Morrison, as administratrix, to recover damages suffered by her and her two minor children through the death of the husband and father, Jean Morrison. On the 6th day of September, 1916, Jean Morrison was a foreman in charge of a building and bridge gang of the appellant. His division extended from St. Maries, Idaho, to Malden, Wash. Morrison was an experienced man in his employment. A part of the equipment of the bridge gang was a gasoline car. The day before the accident, Morrison had repaired the brake blocks by nailing a strip of iron along the face. He went to Spokane in the afternoon and returned at noon the next day, meeting up with his gang at about noon. During his absence one Weller was in charge. He took the car out of Plummer in the morning. The crew were accustomed to ride on it to and from their work. The brake blocks dragged the wheels, and the car had great difficulty in making the grade, which is fairly heavy at that point. Weller took it upon himself to remove the iron shoes. Morrison arrived at Mowry, where the gang were employed, about noon and took charge of his crew. The gang was engaged in unloading concrete tiling to be used in replacing wooden culverts. The tiling had been shipped from Spokane on five cars and had landed at Mowry, which is a blind siding west of Plummer Junction, three days before. At about 5:30 p. m. Morrison went to a telephone booth, which is maintained for the convenience of appellants's employees, and called the agent at Plummer. The agent details the conversation:

"Q. Tell the jury what Morrison said to you when he called you on the phone. A. When he rang and I answered, he said: 'Hello, Frank.' I said: 'Hello, Jean.' He said: 'How is second 63?' I said: 'They are at Peede. I was just talking to the conductor, and they will be at Plummer or out here just ahead or behind 27' He said: 'All right,

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Frank. I am coming down the mountain.' That is all that was said, and he hung up."

First 63 is a regular freight west bound, and second 63 is probably a second section of the same train. We do not remember that the record makes this clear. First 63 was due at Plummer Junction at 10:34 a. m., and at Mowry at 11:25 a. m. While the men were eating their dinner, a west-bound freight passed. It carried white flags to indicate that it was an irregular train. It is the theory of counsel for appellant that Morrison negligently assumed that this train was first 63, having passed Mowry at about the time first 63 would be expected to pass, and if was for this reason that he asked for the whereabouts of second 63 which he would have reason to believe would follow the first of that number.

One or more of the witnesses say that Morrison said just before going to the telephone that he was going to get a line up, which means information as to the movement of trains. The witnesses say that when he returned "he said we had clear sailing to Plummer Junction." The men got on the car with Weller at the lever. Morrison and three others were riding on the front end of the car. They had gone about a mile and a half when they came upon a freight train about 300 feet away and coming down the hill. All of the men got off the car, Weller being the last to leave it, but Morrison, who was standing up crying, "Stop it! Stop it!" was killed by the passing train.

Negligence is alleged in two counts: First, that appellant was negligent in that it gave, through the agent, wrong information as to the location of the train which collided with and killed Morrison; and, second, that the brake shoes on the gas car had without his knowledge been tampered with by one of his men and so changed that their breaking power was insufficient to stop the car and avoid the collision after the train was sighted.

Aside from the question of negligence, the main contention of the appellant is that the deceased was not "employed in interstate commerce" as the term had been defined and applied by the Supreme Court of the United States when considering the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]). Counsel for both sides assume to cite apt authority to sustain their respective contentions, and quarrel violently as to what the Supreme Court has held under the act. Counsel for appellant insists that the later opinions of the court indicate a recession from the holdings of some of the earlier cases, notably the Pedersen Case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, upon which respondent confidently relies, while opposing counsel insists with an equal show of authority that the court has not questioned, but has rather reaffirmed, the Pedersen Case, and proves his position by reference to later decisions of the court which cite the Pedersen Case as authority. It would lead to no result worth while to review the several opinions of the Supreme Court with a view to judicially declaring our opinion of the attitude of the court toward the Pedersen Case. All of the decisions of that court are learned discussions when read in the light of the facts of the case at hand, but they are not always helpful as authority. They are in some respects seemingly contradictory. It could hardly be otherwise, for, the employer being engaged in interstate commerce and intrastate commerce at one and the same time, it would seem to be impossible to lay down a general rule which would govern in every case. To quote from a writer in the Docket, vol. 2, No. 39, April, 1918:

"The chief difficulty, perhaps that is usually met with in the attempt to solve the question, is due to the fact that practically all railroad tracks, and a large majority of other railroad facilities, are used in both interstate and intrastate commerce, so that the line of demarcation, the 'twilight zone,' between the two uses, is necessarily uncertain and incapable of being reduced to a state of certainty."

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However much is made of the definition in the Pedersen Case and repeated in several succeeding cases: "The true test always is: Is the work in question a part of interstate commerce in which the carrier is engaged"—which to the writer is no definition at all. It conveys no more meaning than the letter of the act itself, which permits a recovery if the one injured is at the time "employed in interstate commerce in which the carrier is engaged"—which to the writer is no definition at all. It conveys no more meaning than the letter of the act itself, which permits a recovery if the one injured is at the time "employed in interstate commerce." The question, "What is interstate commerce?" is still open, for, as said in the same case:

"In order to clothe an employee's employment with an interstate character, it must be shown that the work that he is performing had some direct relation and immediate connection with the interstate commerce of the employer."

[1] We find ourselves unable to harmonize the decisions of the Supreme Court upon the federal Employers' Liability Act. It is patent, however, that the law is intended to be applied in spirit rather than by letter. It is useless to attempt an accurate definition of an act or series of acts which will bring a case within or place it without the provisions of the statute. As it seems to us, the dominant thought underlying the question of whether in a given case an employee was or was not engaged in "interstate commerce" is this: Would the performance of the act in which the employee was engaged directly and immediately tend to facilitate the movement of interstate commerce, or, conversely, would the failure to perform the act directly and immediately interfere with or hinder the movement of such commerce? In applying this test, the three essential factors to be considered are time, place, and intent. That is to say, Was the act which the employee was performing in point of time, place, and intent so directly connected with interstate commerce as to constitute an integral part of interstate transportation? If it was, the employee is entitled to the protection of the act. If not, he is not. This brings us, as in all cases brought under the act, to the facts of the instant case. The work being done and its relation and connection with the interstate commerce of the employer, or its lack of such relation and connection, must be found in the record. We shall quote all of it that pertains to the subject. We have italicized the more pertinent parts. The head carpenter testified:

"Direct: Q. And state whether or not you had charge of the providing of the materials for the use of this gang in keeping up this roadbed as I have described? A. Yes, sir. Q. Do you recall the work that was being done on the 6th of September last at Mowry by Mr. Morrison and his gang with reference to unloading some concrete pipe? A. Yes, sir. Q. State whether or not the concrete pipe was company property for repairs, to use as repairs? A. *That was company property, and not to b used as repairs; it was to be used as renewals.* Q. Was for what pur ose as renewals? A. *Renewal of culverts, when the old culverts liv their life out.* Q. In other words, it was company material? A. Yes, sir; company property. Q. *Yes, to be applied to the roadbed whenever needed to be applied?* A. *Yes, whenever proper.* Q. Where did that come from? A. I think it came from Massy & Co., of Spokane, and was ordered through them. Q. Was shipped from Spokane to Mowry? A. As I remember it, it was; yes, sir. Q. This unloading was done shortly after it arrived there, was it? A. Yes, sir; a very short time.

"Cross: Q. And there were five cars spotted on this siding for unloading, at that point two or three days before they were unloaded? A. Yes, sir. Q. They had remained there at that point with these loads on for that purpose, and the purpose of your unloading this tiling at those points was to store them there for future use in connection with the

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railroad at some point? A. Yes, sir. Q. *The tiling has not yet been used?* A. *It has not.* Q. It is there to this day? A. There now. Q. All the tiling that was unloaded under the superintendence of Mr. Morrison? A. Yes, sir. Q. The tiling that was unloaded on the day that Mr. Morrison was hurt and was superintended by him have not been devoted to any use watsoever in connection with the railroad at this time? A. They have not.

An employee testified:

"Q. Where were those (tiles) placed that you speak of at Sorrento and Mowry? A. Under the culvert, to put under the track there for the water to run through. Q. Had you put in like culverts from time to time? Mr. Korte: I object as immaterial. The Court: Overruled. Q. Had you put in like culverts of like materials from time to time before that? A. We put in like it; yes, sir. Not at that place, though. Q. No, but on different places on the line, like material? A. Yes, sir; put in wood. Q. No, I say like material, material of the same character as this same kind of piping? A. Yes, sir; we had. Q. What was the purpose of putting that in, if you know, on the roadbed? A. Why, for the water to run through. Q. You mean water running under the track? A. Yes, sir. Q. Was that the custom, to use it where it was unloaded or in that close vicinity? A. In that close vicinity; yes, sir."

Another employee testified:

"Q. During that time you worked in the same gang, I presume? A. Yes, sir. Q. What you call the bridge gang? A. Bridge and building crew. Q. All right. And along that same division? A. Yes, sir. Q. Extending from Malden to St. Maries? A. Yes, sir. Q. And engaged in the same class of work keeping up the roadbed? A. Yes, sir. Q. What kind of work were you doing? A. At what particular time, please? Q. Any place along there between Malden and St. Maries when they had this car in use. A. Repairing bridges. Q. Repairing bridges? A. Yes, sir. Q. Putting in culverts? A. Yes, sir. Q. Concrete culverts? A. Yes, sir. Q. How long a time did that extend that you had this car with you, doing that kind of work? A. Well, during all that time I was under Mr. Morrison as a workman."

We had gathered the impression from respondent's brief and argument that the company was engaged in the carrying out of a definite program for the renewal of all wooden culverts with cement tiling, in which event we would incline to the belief that the act might fall within the benefit of the act. But we hardly think the record when taken as a whole will bear out this assumption. If it were true, it would have been a matter of easy proof. Since negligence is not to be presumed, but is to be evidenced by competent proofs—whether direct or circumstantial—we would not be warranted in presuming a fact in order to bring the thing done within the provisions of the act.

[2] The unloading of the concrete tiles did not tend to facilitate interstate commerce, or conversely, directly or immediately interfere with or hinder the movement of such commerce. It was work incident to the repair and upkeep of the road. It possessed the element ultimate intent, but it lacked the other essentials time and place. The record would not sustain a holding that the tiling or any other considerable part of it was to be used immediately or within a reasonable time. It was to be used as needed for replacements, and was being stored for such future use, the place of its use being uncertain and the time when it might be used being indefinite, it had lost, if it ever possessed it, the character of interstate commerce.

Although failing to harmonize the opinions of the Supreme Court, it does not follow that we cannot make profitable references to them:

"The question, then, being one chiefly of fact, it follows that to a certain large extent the decision in each case will depend primarily upon

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the facts in that particular case; but much light may be thrown upon those facts, frequently, by careful consideration of what has been adjudicated by the higher federal courts in decided cases in which substantially similar facts have been involved." The Docket, vol. 2, No. 39, April, 1918.

Keeping in mind, therefore, that it is not every employee of a railroad doing an interstate business (that is the reef upon which the first Employers' Liability Act was wrecked, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297), but only such as are directly and immediately connected with interstate commerce, let us look at the cases.

If deceased had been injured while putting tiling in place of the wooden culverts, or in going to or returning therefrom, the case would probably fall within the rule of Horton v. O. W. R. & Nav. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8; but the storing for future use, with no showing except by barest inference that the material was to be used except as needed for replacements, takes the case out of employment. The distinction, after reference made to state and federal authority, is markedly pointed out in Killes v. Great Northern Ry. Co., 93 Wash. 416, 161 Pac. 69. The court said:

"In Horton v. Oregon-Washington R. & Nav. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, we reviewed the cases then reported to determine a practical test to apply to cases that would fall within the act, and reached the conclusion that the employment of the injured servant must be in connection with some instrumentality used in interstate commerce, and that the relation of the employment to interstate commerce must be such that an injury to the servant tended to hinder or delay the movement of trains engaged in such commerce. We sustained the action as within the act in that case upon the theory that an employee whose duty it was to attend a pumping plant furnishing necessary water to interstate trains was employed in furthering the movement of interstate traffic as much as the fireman who stoked the engine, the switchman moving oil for use in an interstate engine, or the servant who repaired the engine or cars, and that, in going to his employment by the means supplied by the master, he was under the protection of the act to the same extent as the fireman passing from one phase of his employment to another, in each of which cases the action has been sustained."

The intended use of material is not a certain test, and, although the tiling may have been thereafter actually placed in the roadbed, it would not follow that the act of unloading was directly or immediately connected with interstate business.

In New York Central & H. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, the court took occasion to say, while distinguishing the case of Ill. Central R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163 (two cars were being moved between two points in the same state when the plaintiff was injured):

"The fact that they might soon thereafter be used in interstate commerce did not affect their intrastate status."

In Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the employee has been engaged in switching certain coal belonging to the company from a storage track to a coal shed. After the coal had been put in the shed, it was supplied to all locomotives as needed and without reference to their character as interstate or intrastate instrumentalities. The only ground for invoking the liability act was that some of the coal thus stored would eventually be used as fuel by locomotives in interstate hauls. It was held that it was not material that deceased had been engaged in interstate commerce or that he might be so engaged thereafter.

"As we have pointed out, the federal act speaks of interstate commerce in a practical sense suited to the occasion, and 'the true test of employment in such commerce in the sense intended is: Was the em-

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ployee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?' Shanks v. Del., Lack. & West. R. R., 239 U. S. 556, 558 [36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797], and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

The coal had been on cars on storage tracks for a week or more—here the tiling had been on the track three or four days. Now substitute tiling for coal, and we have the case almost identical with the case at bar. Instead of putting the tiling in a chute or warehouse, it was stored on the ground, which, as the court says, "was nothing more than the putting of the coal (tiling) supply in a convenient place from which it could be taken as required for use." See, also, D. L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070; N. Y. Cent. Ry. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54; Salmon v. Sou. Ry. Co., 133 Tenn. 223, 180 S. W. 165; Hudson & Maine Ry. Co. v. Iorio, 239 Fed. 855, 152 C. C. A. 641; Cinn., N. O. & T. P. R. Co. v. Hansford, 173 Ky. 126, 190 S. W. 690.

The reader will note the testimony quoted in the Hansford Case, and compare it with that quoted by us. The facts make the cases identical. The Iorio Case is valuable, in that it points clearly to the obvious distinction between the Pedersen Case and the cases cited above:

"There is plainly a difference between the actual or imminent employment of the bolts in repairing the bridge, as in the Pedersen Case, and the mining of coal wherewith to run interstate locomotives, as in the Yurkonis Case. Whether such difference entails a distinction is a matter upon which opinions might conflict as the dissent in Supreme Court decisions under this statute clearly shows. But by the latest pronouncement of that court in Minneapolis, etc., Co. v. Winters, 242 U. S. 353, 37 Sup Ct. 170 61 L. Ed. [358, Ann. Cas. 1918B, 54] January 8, 1917, it is in effect declared that when one claims the benefit of the act here invoked, because of the character or employment of the thing upon which he was working at the time of injury, then the character of that thing 'as an instrument of commerce depended on its employment at the time (of injury), not upon remote probabilities, or upon accidental later events.'"

In Missouri, K. & T. Ry. Co. v. Watson (Tex. Civ. App.) 195 S. W. 1177, the workman, a section hand, was engaged in picking up ties that had been thrown on the right of way on the same day and stacking them near a toolhouse for use, at which time they would be loaded on a push car and transported to a place where they would be used in the repair of the track. It was "concluded that the proof does not show that appellee was injured while engaged in interstate commerce." The case of respondent is fairly put by counsel. They say:

"The mere expectation or probability that the concrete pipe would be used, when being built or constructed, in maintenance of defendant's roadbed, would not be sufficient, of course; but again we say the evidence in this case shows to any reasonable mind that the concrete tiling was, bought, transported, and was being unloaded as a part and parcel of the acts and things necessary to be done in carrying on the work of upkeep and maintenance of this railroad."

But the fault of this argument is that it leaves the fact upon which the legal conclusion must rest to inference and puts the burden of proof on appellant; whereas, the fact, if it were a fact, was capable of actual proof at least to the extent of making a prima facie case. We note that counsel contends that one of the men employed testified that the tiling

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was to be used, as of course it was to be used, in the vicinity, and that tiling had therefore been put in in that vicinity; but as we have said the mere storing of supplies to make repairs or replacements when needed is not enough, for the employment lacks the element of time or reasonable time, which is the sustaining thought in the Pedersen Case.

[3] As a reason notwithstanding for supporting the judgment, counsel says that the tiling having been shipped from Spokane, Wash., to Mowry, Ida., was impressed with an interstate character, and, being unloaded "a very short time after its arrival," it had not lost its character, and that the unloading was part of the interstate transportation. But if it be granted that supplies and materials bought by and transported by a carrier are indeed commodities and objects of interstate commerce within the meaning of the Liability Act, the contention is met by the court upon which we must rely for our guidance in the Harrington Case, where the shipment had originated in Missouri and the accident occurred in Kansas. "With the movement of the coal to the storage tracks," says the court, "we are not concerned; that movement had long since ended." The cars had been on the storage tracks for a week or more. But we attach no particular importance to the reference to time. If the movement had ended and the thing transported were left ready for other movement by other hands, the element of lapsing time could not affect the rule one way or the other. So in Pierson v. N. Y. Ry. Co., 83 N. J. Law, 661, 85 Atl. 233, new rails had been shipped from Buffalo, N. Y., to a station in the state of New Jersey, where they stood on the tracks for three or four days. They were then hauled to the place where they were to be put in place. The injury occurred in this movement. While we would doubt this case upon its main features, the decision upon which it rests was overruled. 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. The court's reference to the question now presented seems to us to be consistent with the Harrington and the Yurkonis Cases. It is:

"The transportation of the rails from Buffalo to Beaver Lake was interstate commerce, at least until they were turned over to the defendant company en route for further carriage; but when they reached their destination at Beaver Lake they ceased to be an object of such commerce. In afterward transporting them from Beaver Lake to the point where they were to be used in replacement of the old rails, the defendant company was not engaged in commerce at all, we think—certainly not in interstate commerce."

In Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070, it is mentioned in the syllabus that the cars which had been hauled from the state of Pennsylvania to New York had stood on the tracks 17 days, but the writer of the opinion seems to attach no importance to the element of time. The case turns rather upon the holding that "while removing them the switching crew was not employed in interstate commerce."

It follows that plaintiff's case does not fall under the protecting influence of the federal act and that the action cannot be maintained.

Reversed, with instructions to dismiss.

Main, C. J., and Fullerton. Mount, Parker, Mackintosh, Mitchell, and Tolman, JJ., concur.

HOLCOMB, J. I dissent. It is apparent to me that the handling of materials necessary to be used for the permanent maintenance of an interstate commerce railroad, as was the case here, by the employees regularly engaged in that work, was an act of "interstate commerce," or in furtherance thereof, and therefore assuredly controlled by the federal Employers' Liability Act and the Pedersen Case.

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UNITED STATES DISTRICT COURT.

D. RHODE ISLAND.

BARRETT

v.

MACOMBER & NICKERSON CO. (No. 1283.)*

ADMIRALTY—ACTION FOR INJURY TO SERVANT—LAW GOVERNING.

A state Workmen's Compensation Act, which in actions against an employer who has not accepted its terms provides a different measure of compensation from that of the maritime law, does not apply to a seaman injured while employed on a vessel on the navigable waters of the United States.

(For other cases, see Admiralty, Dec. Dig. § 20.)

At Law. Action by Maurice Barrett against the Macomber & Nickerson Company. On demurrer to declaration. Sustained.

Cooney & Cahill, of Providence, R. I., for plaintiff.
Frank Healy, of Providence, R. I., for defendant.

BROWN, District Judge. The declaration states that the plaintiff was employed by the defendant, a corporation of Rhode Island, upon its fishing boat the Macomber, in Portsmouth Bay, a part of Narragansett Bay, and that other servants of the defendant were—

"engaged in handling or swinging aloft a certain hook attached to a net, which hook and net were of great weight, and through the negligent manner in which said net and hook were then and there being handled by the said servants or agents of the defendant corporation, the same fell with great violence upon and against the person of the plaintiff, as he was then and there in said boat engaged in pursuing such duties as were assigned to him."

It is alleged that the defendant corporation had wholly failed to accept the provisions of the Workmen's Compensation Act of the state of Rhode Island then in force; that is, chapter 831 of the Public Laws of Rhode Island, approved April 29, 1912, entitled:

"An act relative to payments to employees for personal injuries received in the course of their employment, and to the prevention of such injuries."

Section 7 of this act provides:

"The right to compensation for an injury, and the remedy therefor granted by this act, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employees entitled to compensation under this act while it is in effect."

The following provision of section 1 apply to an employer who does not elect to accept the provisions of the act:

"It shall not be a defense: (a) That the employee was negligent; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee has assumed the risk of the injury."

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* Decision rendered, September 26, 1918. 253 Fed. Rep. 205.

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Upon behalf of the defendant it is contended that this act does not apply to a seaman engaged on board a vessel upon the navigable waters of the United States: that the state of Rhode Island is without power to make the remedy given in such act exclusive, or to abridge or enlarge the responsibilities or duties of the maritime law.

The plaintiff contends that by section 24, par. 3, and 256, par. 3, of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091, 1160 [Comp. St. 1916, §§ 991, 1233]), the clause "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," entitles him to maintain a suit which shall be governed both in questions of right and of damages by the law of Rhode Island and by the statute of Rhode Island applicable to employers who have not elected to become subject to the provisions of the Workmen's Compensation Act (chapter 831).

The defendant relies principally upon Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1916C, 451, Ann. Cas. 1917E, 900. The plaintiff contends that that case is not controlling, and can be distinguished on the ground that the vessel in question in that case was engaged in interstate commerce, while the boat in this case was not, and that in the Jensen Case the New York state court had granted affirmative relief according to the New York Compensation Act (Consol. Laws, c. 67), whereas in this case the plaintiff does not rely upon any affirmative right created by statute, but upon its common-law right of action as modified by the state statute abolishing the defenses of contributory negligence, the negligence of a fellow employee, and the assumption of risk.

The opinion of the Supreme Court in Chelentis v. Luckenbach S. S. Co., Inc., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. ——, considered directly the effect of the clause "saving to suitors, in all cases the right of a common-law remedy where the common law is competent to give it," saying:

"Plainly, we think, under the saving clause, a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an elective to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

The opinion cites the rules laid down in the Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, and applies the doctrine approved in Southern Pacific Co. v. Jensen:

"No state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law."

It is apparent, therefore, that upon the facts alleged in the present declaration the extent of the obligation of the defendant was fixed by the maritime law, which controlled, not only any suit in the admiralty court, but any action in a common-law court; the right being the same in both courts. See Chelentis v. Luckenbach S. S. Co., 243 Fed. 536, 156 C. C. A. 234, affirmed by Supreme Court June 3, 1918, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. ——; The City of Alexandria (D. C.) 17 Fed. 390.

Upon an examination of the authorities cited it will appear that by the maritime law the ordinary negligence of the seaman or of others of the ship's company, and the doctrine of the assumption of risk, do not debar him from the rights given by the maritime law to be cured at the ship's expense and to his wages.

Upon the question of the principle of liability there would seem to be little difference between rights afforded by the maritime law and those

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afforded by section 1 of the Workmen's Compensation Act of Rhode Island. In respect to the extent of recovery, however, the rules are substantially different, being limited by the maritime law to wages and to being cured at the ship's expense, using the term "cured," not in an absolute sense, but as the term is applied in the authorities cited in The City of Alexandria (D. C.) 17 Fed. 393 et seq. As the injuries were received and the action brought before the amendment of sections 24 and 256 of the Judicial Code, the effect of such amendments need not be considered on this demurrer.

In view of the reasoning of the court in Chelentis v. Luckenbach S. S. Co. and Southern Pacific Co. v. Jensen, it is not apparent that the distinction which plaintiff seeks to make between an "interstate vessel" and a fishing vessel is material. Though the declaration describes the vessel only as a "fishing boat" it was stated at the argument that she is a fishing steamer.

The plaintiff's employment was maritime, and the facts alleged show a case clearly within the admiralty jurisdiction.

In the dissenting opinion by Mr. Justice Pitney, in Southern Pacific Co. v. Jensen, 244 U. S. 252, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, it is pointed out that the decision of the majority cannot logically be confined to cases that arise in interstate or foreign commerce, and that in cases ex delicto the admiralty jurisdiction is dependent upon locality, and that if a cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly interstate, or upon one not engaged in commerce at all, the maritime courts have jurisdiction. There is a well-recognized rule concerning measure of recovery in such cases, and it seems to follow from the decisions that the state is without power to deprive either the seaman or the vessel owner of the respective rights under the maritime law.

I am of the opinion, therefore, that the Rhode Island statute is inapplicable to the facts alleged.

As the plaintiff's declaration seeks full indemnity under the law of the state of Rhode Island, and does not set forth merely a claim for any wages unpaid or for the expense of cure and maintenance for a reasonable time, according to the rule stated in The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, the demurrer must be sustained.

Demurrer sustained.

SUPREME COURT OF COLORADO.

EMPLOYERS' MUT. INS. Co et al.

v.

INDUSTRAIL COMMISSION OF COLORADO et al. (No. 9377.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPUTATION OF COMPENSATION.

Under the Workmen's Compensation Act, the life expectancy of a claimant suffering from permanent partial disability is at least a proper element for consideration to assist in determining whether he is entitled to the full maximum allowance or a less sum.

(For other cases, see Master and Servant, Dec. Dig. § 385 [11].)

* Decision rendered June 3, 1918. Rehearing denied, Dec. 2, 1918. 176 Pac. Rep. 314.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WEEKLY PAYMENTS.

The Workmen's Compensation Act is to be construed liberally for the protection of the employee in reference to payments for disability, and the Commission is restricted as to the amount of the weekly allowances only by the statutory maximum, regardless of the aggregate amount awarded.

(For other cases, see Master and Servant, Dec. Dig. § 385 [1].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RETAINING JURISDICTION.

The Industrial Commission, not only has the right to retain jurisdiction of a proceeding to obtain compensation for further action and award, but such is its legal duty where the extent of claimant's disabilities cannot be immediately ascertained.

(For other cases see Master and Servant, Dec. Dig. § 419.)

4. MASTER AND SERVANT—ORDERS OF INDUSTRIAL COMMISSION—REVIEW.

Findings and award of Industrial Commission, which are manifestly supported by competent evidence, may not be lawfully overturned on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AMOUNT OF COMPENSATION.

Claimant, in proceeding to obtain compensation, under Workmen's Compensation Act, who suffered a fracture of base of skull, as a result of which his sight and hearing were impaired, and who suffered from dizziness, headache, and general disability, being unable to work at his occupation of mining coal, condition being probably permanent, it was not inequitable to allow him compensation for 25 per cent. disability, to be reduced at any time upon proof of an improvement in his physical condition.

(For other cases, see Master and Servant, Dec. Dig. § 385 [11].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WEEKLY ALLOWANCES—INJUNCTION.

Payment of weekly allowance under an award by the Industrial Commission cannot be enjoined pending a decision of the court on questions involved.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½].)

En Banc. Error to District Court, City and County of Denver; John A. Perry, Judge.

Proceedings by Thomas Pier, under the Workmen's Compensation Act, to obtain compensation for personal injuries, opposed by the Leyden Coal Company, the employer, and the employers' Mutual Insurance Company, insurer. There was an award, which was affirmed by the district court, and the insurance company and employer bring error. Affirmed.

L. Ward Bannister, Leroy McWhitney, and Samuel M. January, all of Denver, for plaintiffs in error.

Leslie E. Hubbard, Atty. Gen., and Charles Roach and John L. Schweigert, Asst. Attys. Gen. (Walter E. Schwed, of Denver, of counsel), for defendants in error.

BAILEY, J. In this case, it is sought to have set aside a finding and award of the State Industrial Commission. In January, 1916, Thomas

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Pier, hereinafter called the claimant, was injured by the fall of a rock in a mine of the Leyden Coal Company, where he was employed. By agreement, approved by the Commission, he was allowed $8.00 per week from February 20th, 1916. In August 1916, upon hearing the Commission found that as a result of the injury he had lost twenty per cent. of the hearing of both ears, forty-five per cent. of the use of the left eye, and had suffered a permanent facial disfigurement. Taking as a basis the specific indemnity schedule of the Compensation Law (Laws 1915 p. 515), and the average wages of the claimant, together with the partial disabilities as above set out, the Commission found that claimant should receive $8.00 per week for approximately sixty-one weeks or until April 20th, 1917, aggregating $468.40; that deducting the amount already paid, claimant was entitled to $340.82, including $50.00 as indemnity for permanent facial disfigurement, and the order provided that he might apply for further compensation after April 20th, 1917, should his disability extend beyond that date. By specific order the Commission retained jurisdiction of the case.

Presently before the 20th of April, 1917, claimant filed a petition for further compensation, and a hearing was had, following which, on June 6th, 1917, a finding was entered to the effect that the claimant was permanently partially disabled to the extent of twenty-five per cent.; that his expectancy of life was 21.12 years; that had his disability been total the value of such expectancy, computed at $8.00 per week, would be $8,785.92, twenty-five per cent. of which would be $2,196.45; that the maximum indemnity allowed under the compensation law is $2,080.00, and claimant was allowed further compensation at the rate of $8.00 per week, or $34.72 per calendar month, until he should receive $2,080.00, less the amount already paid him. The order further provided that the insurer might at any time apply to the Commission for such relief as might be proper should changes occur in the physical condition of claimant.

The Leyden Coal Company and the Employers' Mutual Insurance Company applied for a rehearing which was denied. They then filed their complaint in the district court against the Commission and the claimant. That court affirmed the findings and award and the companies bring the case here for review.

In substance the errors alleged are that the method of calculating the amount of compensation is wrong, the amount awarded excessive, and the payments thereof unlawfully augmented; that the finding of a disability of twenty-five per cent. is erroneous, as including improper elements; that the findings do not support the award; and that there is no evidence to support findings of disabilities other than those existing prior to the award of August, 1916, which it is insisted have already been finally and fully compensated.

[1] The method used to calculate the amount of compensation appears to have not only been a proper one, but the only practicable one. It was plainly necessary to discover to what extent claimant was disabled, as that is the basis upon which he was to be compensated, and without which determination he could receive no compensation. The extent of the disability having been ascertained, and the condition determined to be permanent, it was permissible for the Commission to ascertain and consider the life expectancy of claimant as an aid to fixing the aggregate amount due him under the statute. Inasmuch as the statute provides a maximum amount which a claimant may receive for permanent partial disability, his life expectancy is at least a proper element for consideration to assist in determining whether he is entitled to the full maximum allowance or a less sum.

[2] The insurance company vigorously assails the order compelling payment of $8.00 per week on the ground that claimant is entitled to only approximately $2.50 per week. Under the compensation act the only restriction is as to the weekly allowance which is limited to not more than $8.00

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per week. Section 57 of the act provides, that after six months from the date of injury payments may be ordered made "in such manner as it" (the Commission) "may determine to be for the best interest of the parties concerned." The act is to be construed liberally for the protection of the employee in reference to payments for disability. In re Meley, 219 Mass. 136, 106 N. E. 559.

The basis of the objection on the part of the insurance company to the payment of the sum found to be due under the compensation award, in payments of $8.00 per week, rather than the smaller sum, is that this increase in weekly payments operates to the detriment of the company, for the reason that the longer the time given it to complete the payment, the more likelihood there will be that claimant will die, and so relieve the insurer of further liability. While this may be, and probably is, true, as matter of fact, it is neither a legal nor logical reason for denying the right of the Commission to use its discretion in the matter of the size of the weeky installments, after the lapse of the first six months immediately following the injury.

[3] The finding that claimant was disabled to the extent of twenty-five per cent. of normal effectiveness is not erroneous, either because it includes improper elements, or elements for which adjustment has already been made. When the award of August, 1916 was made the full extent of the claimant's disabilities were not ascertained, nor could they be then ascertained and compensated with justice either to the claimant or the insurer. As was said in Lemieux v. Contractors' Mut. Liability Ins. Co., 223 Mass. 346, 111 N. E. 782:

"It is common knowledge that the results of physical injuries are very often not determinable at the time they are received; in the common course of events, a requirement that such results shall be stated is to demand the performance of an impossible thing."

The finding and award of August 1916, was not final in the sense that regardless of the future physical condition of claimant neither he nor insurer should be permitted to show such physical change. For this reason the Commission not only had the right, but it was its legal duty, to retain jurisdiction of the case for further action and award if the facts should so warrant. The finding and award made at the first hearing are abundantly supported by the evidence, and cannot now be properly disturbed.

[4] The decree of June 7th, 1917, was based upon the evidence taken at a previous hearing, at which it was shown that the original disability of the claimant had grown worse, and that new disabilities were manifesting themselves. Thereupon the Commission made new findings and a new award, which manifesly are supported by competent evidence, and which may not, therefore, be lawfully overturned by this court. As neither the first nor the second findings of fact were in excess of the powers of the Commission, nor procured by fraud, and as both are supported by sufficient competent evidence, there is no ground for attack upon either.

[5] Claimant was found to have suffered a fracture of the base of the skull, usually a fatal injury, as a result of which his sight and hearing were impaired, and he suffered from dizziness, headache and general disability; he was unable to work at his occupation of mining coal, by which he was accustomed to earn $18.00 per week; he was unable to do any hard work for long at a time; and that his condition would probably be permanent. Upon these facts he was adjudged to have suffered a loss of twenty-five per cent. of his earning capacity, and payment was ordered accordingly, with the right to have payment reduced at any time upon proof of an improvement in his physical condition. So far as the insurer is concerned, the findings and award could not well have been made more equitable, and were and are clearly within the letter and spirit of the compensation act.

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In reaching a conculsion the Commission appears to have proceeded in an expeditious and summary manner, as is the rule in compensation cases, with no more formality, technicality or restrictions than are necessary to preserve the rights of both parties, and administer justice. In re Hunnewell, 220 Mass. 351, 107 N. E. 934.

[6] The insurance company applied in the distrct court for an injunction against the enforcement of the award of the Commission until the court had passed upon the questions involved. That application was denied below and renewed here, where it was again denied.

It is to be noted in this connection that the judgment of the Commission in favor of a claimant is prima facie evidence of his right to recover. Procedure under the act is summary in character in order to furnish immediate aid to injured employees, and a careful reading of the statute as a whole leads to the conclusion that it was the intention of the legislature that payment of these weekly allowances should not be staid. Indeed, to hold that such payments can be enjoined pending judicial review would in effect practically nullify one of the prime objects and purposes of the law.

A painstaking consideration of the whole record discloses no reversible error and the judgment of the district court is affirmed.

Judgment affirmed.

White and Teller, JJ., not participating.

SUPREME COURT OF COLORADO.

INDUSTRAIL COMMISSION OF COLORADO et al.

v.

MARYLAND CASUALTY Co. (No. 9288.)

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXISTENCE OF RELATION—"SERVANT."

A contract, providing for digging tunnel for an express consideration, which gave party desiring tunnel dug right to withold 20 per centum of compensation until work was completed, but contained no reservation of any control of work more than was necessary to insure its producing result provided for, did not create the relation of "master and servant" under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Servant.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RELATION—"SERVANT."

Mere fact that an independent contractor followed the directions of representatives of the owner of a mine regarding the work of digging a

*Decision rendered June 3, 1918. Rehearing denied, Dec. 2, 1918. 176 Pac. Rep. 288.

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tunnel did not change the relation to that of "master and servant," under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig § 367

Hill, C. J., and Scott, J., dissenting.

En Banc.

Error to District Court, City and County of Denver; John A. Perry, Judge.

Proceeding by Catherine Reddy, under the Workmen's Compensation Act (Laws 1915, p. 515), to obtain compensation for the death of John O'Mera, a nephew, opposed by C. H. Weaver, the employer, and the Maryland Casualty Company. From a judgment of the district court setting aside an award by the Industrial Commission in favor of the claimant, the Industrial Commission and the claimant bring error. Affirmed.

Leslie E. Hubbard, atty. Gen., John L. Schweigart, Asst. Atty. Gen., Stephen W. Ryan, of Denver, and M. F. Ryan, of Leadville, for plaintiffs in error.

Smith, Brock & Ferguson and John P. Akolt, all of Denver, for defendant in error.

TELLER, J. This cause is before us to review a Judgment of the district court setting aside an award by the Industrial Commission in favor of said Reddy, and directing that the claim be dismissed.

It appears from the record that said Catherine Reddy was the aunt of John O'Mera, who was killed in a mine near Leadville, and that she makes claim, as a dependent upon the deceased, for compensation from one Weaver, the owner of the mine, and said casualty company.

O'Mera, at the time of the accident, was working in a tunnel being driven by Larson and O'Neil on the property of Weaver, under a contract in the words and figures following:

"This agreement, made and entered into this 10th day of December, A. D. 1915, between C. H. Weaver, party of the first part, and Gus Larson and James O'Neil, parties of the second part, all of the county of Lake, state of Colorado, witnesseth:

"That whereas first party is desirous of securing the driving of the 'Anderson Tunnel' in Birdseye Gulch, and second parties are desirous of driving said tunnel,

"Now, therefore, second parties agree to drive said tunnel 500 ft. from the present breast of said tunnel, 5 ft. wide by 7½ ft. high in the clear in such direction and on such grade as shall be directed by the engineer in charge, timbering where necessary. To drive a water ditch under the track 10 inches deep by 20 inches wide, and install all track, timbers, air pipe and ventilation pipe. To furnish all fuse, caps, powder and candles used in said work, and keep the boarding house supplied with wood and water. To do all work in a miner-like fashion and maintain all work driven under this contract until the completion of said contract. To maintain all tools and machinery in as good condition as when furnished, ordinary wear and tear excepted. To work continuously from this date with three shifts employed at all times underground.

"In consideration whereof, first party agrees to furnish all tools, timbers and supplies except as above mentioned, furnish blacksmith, and keep the dump in condition for dumping dirt and rock at all times. To maintain a boarding house and board all the men engaged on said contract for $1 a day per man. In case of the discharge of any man or men in the employ of the contractors, to pay same forthwith and deduct the amount from the next settlement with the contractors. To pay for said

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work $11 per linear foot until such time as plant is installed for the operation of power, after which time the price shall be $7.50 per foot, said payments to be made on or before the 5th day of each calendar month for all work completed before the end of the preceding calendar month. It is agreed that first party shall retain 20% of the contract price until the completion of said contract as a guaranty for the completion of said contract.

"C. H. Weaver.
"Gus Larson.
"James O'Neil."

On the hearing before the commission, evidence was introduced to show that, despite the contract, Larson and O'Neil were not independent contractors, but mere employees of Weaver and his partners. This evidence consisted of statements as to conversations with Weaver, and acts of control exercised over the work by Anderson, one of the partners of Weaver, and one Campbell, who succeeded Anderson in the general superintendence of the mine; also by an engineer who came occasionally to the mine to see that the tunnel was run on proper lines. There was evidence also of an alleged usage which claimants contended changed the terms of the contract. From this the commission found that Larson and O'Neil were employees of Weaver, and that consequently O'Mera was also one of his employees.

The district court held that the contract was plain and unambiguous, and hence evidence as to what was said of and about it was not admissible; and further that the evidence, if admissible, did not change the effect of the contract.

[1] In this we think the court was right. The contract provides for the doing of a specific thing by the parties of the second part, for an expressed consideration, and gives to the party of the first part the right to withhold 20 per cent. of the compensation till the work is completed. It contains no reservation of any control of the work more than is necessary to insure its producing the result provided for.

In Good v. Johnson, 38 Colo 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896, this court determined that one was an independent contractor, and not a servant, from the fact that the contract gave no right of control other than that which would secure the proper result from the work. Under the rule adopted in that case, none of the things which Weaver or Anderson was said to have done was sufficient to sustain the contention of plaintiffs in error.

There is abundant authority for the above mentioned holding: Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; Pottorff v. Mining Co., 86 Kan. 774, 122 Pac. 120; Foster v. Chicago 197 Ill. 264, 64 N. E. 322; and Labatt's Master and Servant (2nd Ed.), § 25.

[2] In this case it is evident that, when Larson or O'Neil followed the directions of Anderson or Campbell regarding the work, it was done as a concession and not as a matter of contract obligation. A distinction is to be made between authoritative control and mere suggestion as to the detail of the work. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721.

[3] We agree, also, with the court that no custom or usage was proved which would affect the contract as written. Indeed, the matter upon which plaintiffs in error rely is, in fact, neither custom nor usage. The evidence showed only that, in order to hasten the work, miners were sometimes paid in accordance with the amount of work done, working under the control of the mine owner. This fact could have no bearing upon the contract in question, which is plain and unambiguous.

The court in coming to its conclusion, did not vary the findings of the commission, but simply applied the law to the admitted facts. In Good v. Johnson, supra, this court said:

"The contract being in writing, the relation which it created between

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the parties thereto is exclusively within the province of the court to determine."

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.

Hill, C. J., and Scott, J., dissent.

SUPREME COURT OF COLORADO.

KAROLY

v.

INDUSTRAIL COMMISSION OF COLORADO et al. (No. 9281.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DENIAL OF LUMP SUM SETTLEMENT—PREJUDICIAL ERROR.

If claim of injured servant, awarded compensation under Workmen's Compensation Act, for payment in a lump sum, was denied on erroneous theory as to power of Industrial Commission to order such payments in cases of permanent total disability, claimant was prejudiced, though commission also denied application for lump settlement on ground it would not be for best interests of parties.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

Workmen's Compensation Act, being highly remedial and beneficent in purpose, is to be liberally construed.

(For other cases, see Master and Servant, Dec. Dig. § 348

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LUMP SUM SETTLEMENT—TOTAL PERMANENT DISABILITY.

Under Workmen's Compensation Act, § 57, injured servant, totally disabled permanently, and awarded compensation of $8 a week for his life, was entitled to lump sum settlement, if facts warranted the relief; section 57 applying to cases of total permanent disability.

(For other cases, see Master and Servant Dec. Dig. § 385 [20]

Bailey, White and Garrigues, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Proceeding for compensation for injuries under the Workmen's Compensation Act by Joe Karoly, opposed by the Colorado Fuel & Iron Company, employer and self-insurer. Compensation was awarded, and claimant petitioned for payment in gross, which was denied by the Industrial Commission, and claimant petitioned to vacate its order To review judgment confirming the order, claimant brings error. Reversed and remanded.

* Decision rendered, May 6, 1918. Rehearing denied, Dec. 2, 1918. 176 Pac. Rep. 284.

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G. W. Musser and John T. Maley, both of Denver, for plaintiff in error.

Leslie E. Hubbard, Atty. Gen., and John L. Schweigert, Asst. Atty. Gen., for Industrial Commission.

Fred Herrington, of Denver, for defendant in error Colorado Fuel & Iron Co.

ALLEN, J. On and prior to August 6, 1915, the plaintiff in error, Joe Karoly, was an employee of the Colorado. Fuel & Iron Company, one of the defendants in error . On the date above named Joe Karoly was injured by an accident arising out of and in course of his employment. The employee and employer, above named, were each subject to the compensation provisions of the Workmen's Compensation Act (chapter 179, Session Laws 1915). They were unable to come to an agreement in regard to compensation and the employee applied for a hearing before the Industrial Commission. Such hearing was had in August, 1916. The commission found the facts above stated, and with respect to the accident and the injuries received found:

"* * * That while undermining a loose rock it fell upon him, causing a fracture of the right radius, laceration of the right forearm and hand, fracture of the second and third lumbar vertebræ, causing a marked deformity by protrusion of the lower back at the site of the fracture, also causing permanent cystitis; that up to the present time the said injured employee is totally disabled."

The commission ordered that the company, which was carrying its own insurance, pay to Joe Karoly compensation at the rate of $8 per week, beginning with August 27, 1915, "and continuing throughout the period of his natural life or until such time as compensation shall cease" or the order be modified.

On or about the 18th of January, 1917, and after six months had elapsed from the date of the injury, the plaintiff in error filed before the commission his petition for payment in gross. The petition, after describing the claimant's injuries and condition, alleged, in substance, that he almost continuously suffers severe pains and is totally and permanently disabled in consequence of his injuries; that he requires the attention of a physician every day; that he requires the care of an attendant to wait upon him and medicine and appliances; that he should be in a hospital, where such attention and care can be more readily and cheaply provided; and that such needs will continue for an indefinite time in the future. The petition further alleged that claimant has no money, property, or means other than $8 per week which had been awarded by the commission, and no friends or relatives able to provide any more; that the weekly payment awarded him does but little good, and is wholly insufficient to provide him with necessary food, clothing, physician's attention, medicine, and hospital care; and that as a result he is compelled to live with and endure pain and suffering without ever meager care. The plaintiff in error in his petition states that if he were paid a sum in gross he could then provide himself with the things which are reasonable and necessary for him on account of his disabled and injured condition, and prays that the commission order that he be paid such sum as to the commission may seem meet and proper, not less than $8,500 in gross, or in such manner as the commission may determine.

This petition was heard by the commission on February 5, 1917, and on February 26, 1917, the commission ordered and adjudged that claimant's petition for a lump sum settlement should be denied. The order embodies brief findings of fact, from which it appears that the petition was denied upon two grounds. The commission found:

"That the extent of disability of the claimant cannot at this time be determined, for the reason that the claimant is suffering a permanent total

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disability, and in accordance with the Workmen's Compensation Act, and the award hereinabove mentioned, is to receive payment throughout his natural life, and it is humanly impossible at this time to determine the length of time which the claimant shall live. * * *

"The commission further finds that it is not for the best interest of the parties concerned in this case to grant a lump sum in settlement, and that therefore the claimant's petition for a lump sum settlement should be denied."

On March 30, 1917, the plaintiff in error filed in the district court his complaint or petition to vacate the Industrial Commission's order of February 26, 1917, on the ground that the same is unlawful and unreasonable. The petition in addition to asking that the order be set aside, prayed that the district court enter judgment granting the petition for payment in gross and ordering payment of a sum in gross of not less than $8,500 or in payment of not less than $40 per week.

The Industrial Commission answered, and tendered to the court copies of its findings and awards, and its original record as to the remaining matters pertaining to the proceedings hereinbefore mentioned.

On August 30, 1917, the district court, upon hearing, confirmed the commission's order of February 26, 1917. The claimant brings the case here for review.

The bill of exceptions clearly shows that the trial court based its decision entirely upon the theory that the provision of the Workmen's Compensation Act relating to payments in gross, being section 57, chapter 179, Session Laws 1915 "does not apply to cases of total permanent disability." The findings of the commission, accompanying its order of February 26, 1917, indicate that the commission also took this view of the law.

[1] If such ground is an erroneous theory of the law as to the power of the commission to order payments in gross in cases of permanent total disability, the plaintiff in error was prejudiced by this error, even though the commission also denied his application for a lump sum settlement upon the ground that it would not be for the best interests of the parties concerned. Matecny v. Vierling Steel Works, 187 Ill. App. 448. This conclusion is further supported by the fact that the trial court disposed of the case entirely upon its construction of the statute, without determining whether it would confirm the order of the commission, if the commission did possess the power to order a payment in gross in cases of this kind, and by the further fact that the commission made no definite findings showing the basis of their conclusion that "it is not for the best interests of the parties concerned" to grant the lump sum settlement, and made no definite and specific findings concerning claimant's condition, circumstances, and need of a lump sum payment.

The record, therefore, presents a question of law to be reviewed by this court, namely, whether section 57 of the Workmen's Compensation Act of 1915 applies to cases of permanent total disability, and gives the Industrial Commission the power to order payment in gross in such cases. The section in question provides that—

"Any time after six months have elapsed from the date of the injury, the commission may order payment in gross or in such manner as it may determine to be for the best interest of the parties concerned. When payment in gross is ordered, the commission shall fix the gross amount to be paid based on the present worth of partial payments, considering interest at 4 per cent. per annum."

The purpose of this provision, and of similar provisions in Workmen's Compensation Acts in other states, is evident from the following language contained in Roberts v. Packing Co., 95 Kan. 723, 149 Pac. 413.

"The theory of the Legislature manifestly was that cases would arise in which the condition of the employee would be so marked that there would be little reason to anticipate improvement in earning capacity, and

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that the circumstances would be such as would warrant the court in giving judgment for a lump sum available at once rather than for periodical payments, as in an award."

See, also 1 Honnold on Workmen's Compensation, § 179, p. 653.

[2, 3] The Workmen's Compensation Act "is highly remedial, beneficent in purpose, and to be liberally construed." Industrial Commission et al. v. Johnson (No. 9275) 172 Pac. 422. The court should not adopt such interpretation of a statute as would produce absurd, unreasonable, unjust, or oppressive results, if such interpretation can be avoided. Western Co. v. Golden, 22 Colo. App. 209, 124 Pac. 584.

It is difficult to perceive what circumstances would warrant the payment of a lump sum to an injured employee whose disability is only partial or temporary, which circumstances would not also favor the payment of the lump sum to the employee if his disability were total and permanent. A workman who is permanently totally disabled is as much entitled to the allowance of a gross sum as is any other injured workman. Section 57, hereinbefore quoted, should be construed, if possible, so as to apply to cases of permanent total disability, since such construction would prevent oppressive results, and at the same time be in accord with the policy and purposes of workmen's compensation legislation.

The plaintiff in error was awarded $8 per week, and the commission found that he "is suffering a permanent total disability." If, as is possible, if not, also, probable, according to his petition, the plaintiff in error is or will be compelled to appeal to the public for aid, then one of the objects of the Workmen's Compensation Act will be defeated. The great object of such acts is to shift the burden of economic loss, resulting from these accidents and injuries, from the employee to the industry, and that the burden should be borne by the industry in which the injury occurred rather than by society as a whole. State v. Industrial Commission, 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162. Furthermore, the intent of the act is to provide compensation for injured workmen, and circumstances may occur where the compensation would be more just, equitable, appropriate, and beneficial, if paid in a lump sum than if paid in small weekly installments.

[4, 5] In view of the foregoing observations, there is no reason for concluding that the Legislature intended to exclude from the provisions of section 57 cases of permanent total disability, unless such intention appears from the language used, and it is plain that it does not so appear.

Counsel for defendants in error contend that section 57 is not applicable to cases of permanent total disability, because the number of future partial payments cannot be ascertained. The argument is based upon the following clause in section 57:

"When payment in gross is ordered, the commission shall fix the gross amount to be paid based on the present worth of partial payments."

The result of this clause is that the commission can easily and accurately ascertain the amount of the gross payment in cases where the period during which partial payments are to be paid is fixed at a certain definite number of weeks. There is nothing in the clause, however, which prohibits or prevents the Industrial Commission from fixing a gross amount in cases where the periodical payments are to continue during the life of the injured employee. It is true that the exact number of such partial payments in the future, in such cases, cannot be ascertained. Nevertheless, the commission, in the light of all the facts before it in a given case, may make a reasonable estimate as to the probable number of such partial payments, and the probable duration of the claimant's life. The statute by necessary implication empowers the commission to do this and to determine the present worth of partial payments," whether the exact number of such payments can be ascertained or not. To hold otherwise would be to interpolate into section 57 exception which is not there,

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and to exclude from the operation of that section cases where the injury has produced permanent total disability. An exception not made by the Legislature cannot be read into the statute. 36 Cyc. 1113, note 88. It is not necessary upon the review to determine in what manner, the commission may proceed in fixing the gross amount in cases of this kind, and on this subject no opinion is expressed.

For the reasons above given, the district court was in error in holding that section 57 "does not apply to cases of total permanent disability," and in confirming the order of the Industrial Commission upon such ground. The plaintiff in error was entitled to have his case heard in the district court in the light of the correct interpretation of the law. The judgment of the district court will, therefore, be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Bailey, While, and Garrigues, JJ., dissent.

SUPREME COURT OF ILLINOIS.

HUMPHREY et al.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al. (No. 12033.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—ACCIDENTS ARISING OUT OF EMPLOYMENT—ELEVATORS.

Where deceased was expected to eat lunch and spend the noon hour at factory, and to operate an elevator as occasion demanded, and he was found crushed between elevator and gate during noon hour, employer was liable for compensation when plant was one included within the Workmen's Compensation Act, in the absence of showing that deceased deliberately took his life.

(For other cases, see Master and Servant, Dec. Dig. § 375 [1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—DEFENDENCY OF CLAIMANTS.

To entitle parents of deceased to compensation for his death, it is sufficient if he contributed to their support within four years prior to the time of his injury, and they need not have been dependent upon him.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Error to Circuit Court, Will County; Arthur W. De Selm, Judge.

Application by John Riordan, as administrator of Leo Riordan, deceased, for workmen's compensation, opposed by H. Fred Humphrey and others, partners doing business as Humphrey & Sons, as employers. The award of the Industrial Board for the applicant was confirmed by the circuit court, and the employers bring error. Affirmed.

* Decision rendered, Oct. 21, 1918. Rehearing denied, Dec. 5, 1918. 120 N. E. Rep. 816.

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MacChesney, Becker, Angerstein & Rollo, of Chicago, for plaintiffs in error.

Frank J. Wise and Wm. C. Mooney, both of Joliet, for defendant in error.

COOKE, J. Leo Riordan, while in the employ of Humphrey & Sons at Joliet, Ill., on March 14, 1916, received injuries from which he died on that day. John Riordan, his father, was appointed administrator of the estate. The administrator filed application for adjustment of claim with the Industrial Board, in which he claimed compensation from Humphrey & Sons for the death of his intestate under the provisions of the Workmen's Compensation Act (Hurd's Rev. St. 1915-1916, c 48, §§ 126—142h). On a hearing before the arbitrator, an award was entered in favor of the applicant for the sum of $6 per week for 416 weeks. The Industrial Board, on review, entered an award for the sum of $5.77 per week for 416 weeks. This award was confirmed by the circuit court of Will county, and the presiding judge having certified that this is a proper cause to be reviewed by this court, H. Fred Humphrey and others, partners doing business as Humphrey & Sons, have brought the record here by writ of error.

But two points are urged for reversal: First, that the applicant did not establish that the death was due to an accidental injury arising out of and in the course of the employment; and, second, that the applicant was not entitled to compensation under the act.

Leo Riordan, the desceased, lacked one month of being 17 years of age at the time of the accident. He had been working for several weeks for plaintiffs in error at their plant. For the first 10 days or 2 weeks he worked on a drill press on the second floor of the plant. After that he was transferred to work under the foreman of the foundry, on the first floor. On the day he received the injury from which he died he was engaged in unloading a carload of coke, which was outside the plant. The plant consisted of a building three stories high. A combination freight and passenger elevator was located in the plant, which was operated by steam and ran from the first to the third floor. The elevator was not operated in an inclosed shaft. The entrance to the elevator was guarded on the second and third floors by automatic gates, which rose when the elevator was brought to the respective floors and lowered when the elevator left that floor. All employees of the plant were permitted to use this elevator as they desired and as occasion required. Immediately after his employment the deceased was instructed how to operate this elevator by Harry S. Humphrey, one of the plaintiffs in error. The lunch hour at this plant was from 12 to 12:30 o'clock. The deceased lived too far from the plant to permit him to go home to his noonday meal, so he, with others of the employees of plaintiffs in error, brought his lunch with him and ate at the plant. It was his custom to eat his lunch on the second floor of the building, and he ate it there on the day of the accident. About 12:15 o'clock p. m. on that day, and while the deceased was on the second floor eating his lunch, Samuel Bruner, one of the employees of the plaintiffs in error, stepped on the elevator, which was standing at the second floor, and went down on it to the first floor. He passed through the shop on that floor and went to the engine room. Immediately upon entering the engine room he heard the elevator running rapidly for a short time and then suddenly stop. Other employees upon the second and third floors heard a scream or groan at the same time, and upon going to the elevator they found the deceased wedged tightly between the automatic gate, which operated on the second floor, and the elevator, just beneath the third floor. The elevator was run down almost to the second floor, and the deceased extricated from his position between the gate and the elevator and taken to a hospital, where he died within a short time. No one saw the accident.

[1] It is contended by plaintiffs in error that the deceased must have left the second floor by way of the stairway immediately after Bruner had

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taken the elevator to the first floor and, arriving at the first floor after Bruner had left the elevator, got on the elevator, ran it up to the second floor, and attempted to get off without stopping it, and was caught between the elevator as it ascended from the second floor and the descending gate. One witness testified that on various occasions he had seen this elevator runing wild without any one operating it, and the defendant in error advances the theory that after Bruner had taken the elevator to the first floor, and left it, it started up without any one in charge; that the deceased saw it and in attempting to get on the elevator to stop it was caught between the elevator floor and gate. As the evidence discloses that the deceased left his dinner pail and coat on a drill press on the second floor, the more reasonable theory would be that the deceased went down to the first floor by the stairway, and then determined to go back to the second floor, put away his dinner pail, and secure his coat, or for some other purpose, and got upon the elevator, and ran it back to the second floor, and in some way got caught between the elevator floor and the gate while the elevator was in motion. It is immaterial which of these theories may be adopted, or whether any of them are adopted. The deceased was an employee of plaintiffs in error and it is conceded that they were conducting such a plant as brought them within the provisions of the Workmen's Compensation Act, and that they were operating under that act. The deceased was taught to operate the elevator when he entered the employ of plaintiffs in error, and as an incident of his employment was permitted and expected to use the elevator as occasion required. The fact that the accident occurred during the noon hour and while the plant was not in operation has no bearing on the case. The deceased was required to take his lunch to the plant with him and was permitted and expected to eat it upon the premises. No particular place was assigned to any of the employees to eat their lunch, but each man was permitted to eat it wherever he desired about the plant. All the employees used the elevator during the lunch hour as they had occasion to, just as they used it during the hours the plant was in operation. Whether the deceased was negligent in his operation of the elevator, or in attempting to get off while it was in motion, is immaterial. He was permitted to use this elevator as an incident of his employment, and was so using it. Unless it could be showed that he deliberately placed himself in this position of danger for the purpose of taking his life, the plaintiffs in error are liable under the Workmen's Compensation Act. There is nothing here to indicate that this was anything but an accident. The proof amply sustains the finding that the accident arose out of and in the course of the employment.

[2] The proof discloses that the deceased, when in school, had worked on each Saturday at a grocery store, and he always gave his wages, while so working at the grocery store and for plaintiffs in error, to his mother. The statute does not require that the parents or lineal heirs shall be dependent on the deceased, but it is sufficient if the deceased employee leave parents to whose support he had contributed within four years prior to the time of the injury. Commonwealth Edison Co. v. Industrial Board 277 Ill. 74, 115 N. E. 158.

The judgment of the circuit court is affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

MARSHALL FIELD & Co.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al. (No. 12072.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"EMPLOYEE."

The definition of the word "employee," in the Workmen's Compensation Act (Hurd's Rev. St. 1917, § 130), as "every person in the service of another under any contract of hire, express or implied oral or written," is to be broadly construed.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYMENT—EVIDENCE.

In a proceeding under the Workmen's Compensation Act to recover for death, due to falling into an elevator shaft, evidence *held* to sustain a finding that the employment of decedent as a chauffeur was not casual, although at the time of the accident he was on trial merely.

(For other cases, see Master and Servant Dec. Dig § 405[2].)

3. MASTER AND SERVANT—STATUTES—WORKMEN'S COMPENSATION—UNIFORMITY.

The classification of occupation or employment, made subject to the workmen's Compensation Act, is not arbitrary and wanting in uniformity, so as to make the act unconstitutional.

(For other cases, see Master and Servant, Dec. Dig § 347.)

Error to Circuit Court, Cook County; Oscar M. Torrison Judge.

Proceeding under the Workmen's Compensation Act by James F. Bishop, administrator of the estate of Ralph Woods Rice, deceased, to recover compensation for the death of deceased, opposed by Marshall Field & Co., employer. An award was affirmed on certiorari by the circuit court, and the employer brings error. Affirmed.

Frank P. Leffingwell, of Chicago, for plaintiff in error.

Hiner, Bunch & Latimer, of Chicago (Daniel L. Donovan of Chicago, of counsel), for defendant in error.

FARMER, J. This is a writ of error to review a judgment of the circuit court of Cook county sustaining an award made under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) in favor of defendant in error, James F. Bishop, administrator of the estate of Ralph Woods Rice, who it is claimed was an employee of plaintiff in error and was killed by falling down an elevator shaft while engaged in his employment. The Industrial Board confirmed an award made by a committee of arbitration of $7.50 per week for a period of 416 weeks. The circuit court on writ of certiorari affirmed the act of the Industrial Board,

* Decision rendered, Oct. 21, 1918. Rehearing denied Dec. 5, 1918. 120 N. E. Rep. 773.

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and certified the case was a proper one to be reviewed by this court, and the record has been brought to this court by writ of error.

Ralph Woods Rice, on Thursday or Friday prior to Monday morning, December 1, 1915, applied to plaintiff in error for employment. The application was made to William Yager, superintendent of plaintiff in error's garage, for a position as chauffeur to drive cars or trucks. Yager testified Rice represented himself to be competent and experienced, and Yager told him to report for duty Monday morning, December 1st; that he would put him on and if he was capable of handling a car could keep him steadily until December 24th, at $15 per week. Rice reported December 1st, and Yager ordered the garage foreman, Hillen, to put Rice to work, and to send an old employee with him, to observe how he handled and operated the car. The garage foreman sent an old employee by the name of Fritz out with Rice. Rice drove the car. They went to a warehouse of plaintiff in error on Polk street and hauled a load of goods to another warehouse. They then returned to the Polk street warehouse, loaded 15 cases of blankets on the truck, and took them to the warehouse of the Hartman Furniture & Carpet Company; Rice driving the car. They arrived there about 11 in the morning and backed the truck up to the elevator to unload the cases of blankets. They unloaded 4 or 5 cases onto the elevator, which then ascended to unload the blankets. The elevator shaft door was left open, and Rice and Fritz remained there to await the return of the elevator. It was a cold, windy day, and Fritz testified he stepped off the truck and around in front of the radiator, waiting for the elevator to return. He heard a noise, and, supposing it was the elevator, went back to assist with the work of unloading, but found that the elevator had not returned and that Rice was missing. Fritz discovered him in the bottom of the elevator shaft. Fritz further testified that Rice was a competent chauffeur, and that he would have so reported if the accident had not occurred.

[1, 2] Plaintiff in error, among other grounds for reversal, insists that the relation of employer and employee did not exist at the time of the accident; that if there was any employment of Rice, it was but casual; and that there is no evidence that the accident arose out of and in the course of the employment. An "employee" is defined in our Workmen's Compensation Act as "every person in the service of another under any contract of hire, express or implied, oral or written." Section 130. This provision or definition is to be construed broadly. In re Donovan, 217 Mass. 76, 104 N. E. 431. In our judgment Rice must be held to have been an employee. His continued employment depended upon his ability to drive a car, and he was put to work with the understanding that, if he was competent, he would be continued in that employment. It is unimportant that, his name had not been placed upon plaintiff in error's pay roll. He was killed the first half day he worked and before any report had been made to Yager by Fritz as to his ability. Fritz testified Rice was capable, and, over objections, that he would have so reported. Yager testified he did not permit more than a day's trial to determine the competency of men to do that work. He further testified that, if Rice had been reported competent, he would have paid him $15 per week (the wage agreed upon), commencing the morning of the day Rice went to work. Yager called on Rice's mother the evening after the accident and admitted there was a half day's wages due her son. The evidence was sufficient to sustain the conclusion of the board that the accident arose out of and in the course of Rice's employment. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Ohio Building Safety Vault Co.v. Industrial Board, 277 Ill. 96, 115 N. E. 149. The employment was not casual, within the meaning of that term as defined in Aurora Brewing Co. v. Industrial Board, 277 Ill. 142. 115 N. E. 207, and in re Gaynor, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363.

[3] Finally, it is alleged the classification of occupations or employ-

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ments made subject to the Workmen's Compensation act is arbitrary, not uniform in its operation and therefore unconstitutional. No valid reason why that is so is given in the argument in support of that contention, and we know of none that could be urged.

The Judgment is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

WESTERN ELECTRIC CO.

v.

INDUSTRIAL COMMISSION OF ILLINOIS et al. (No. 12085.)

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW— WRIT OF ERROR.

A writ of error to review action of circuit court in confirming award of industrial board by judgment rendered December 11, 1917, was sued out in time, although the record was not filed until April term, 1918, the complaining party, in absence of provision in Workmen's Compensation Act, having three years after rendition of judgment, under Practice Act. § 117.

(For other cases, see Master and Servant Dec. Dig. § 418[3½].)

2. APPEAL AND ERROR—REVIEW—WEIGHT OF EVIDENCE

The Supreme Court has no power to weigh the evidence.

(For other cases, see Appeal and Error Dec. Dig § 995.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW.

Where industrial board found that employee's death was accidental, and there was competent evidence in the record to support such finding, the Supreme Court, on error to review judgment of circuit court confirming industrial board's award, will not weigh the evidence and will affirm the judgment.

(For other cases, cases, see Master and Servant Dec. Dig § 418[6].)

Error to Circuit Court, Cook County; Oscar Mr. Torrison, Judge.

Procedings under the Workmen's Compensation Act by Carrie Burns Lewis, administratrix of the estate of Melvin T. Lewis, deceased, for the death of Melvin T. Lewis, opposed by the Western Electric Company, employer. There was an award of the industrial board against the employer, and to review the judgment of the circuit court confirming the award the employer brings error. Affirmed.

Holt, Cutting & Sidley, of Chicago, for plaintiff in error.

Kelly, Hale, Dammann & Coolidge, of Chicago (J.F. Dammann, Jr.. of Chicago of counsel), for defendants in error.

COOKE, J. This a writ of error sued out to review the judgment of the circuit court of Cook county confirming the award of the industrial

* Decision rendered Oct. 21, 1918. Rehearing denied, Dec. 5, 1918. 120 N.. E Rep. 774.

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board against the Western Electric Company, a corporation, plaintiff in error, on the application of Carrie Burns Lewis, administratrix of the estate of Melvin T. Lewis, deceased.

[1] It is first contended that this court has no jurisdiction as the judgment of the circuit court was rendered December 11, 1917, more than 50 days prior to the first day of the February term, 1918, of this court, and the writ of error was not sued out and the record was not filed in this court until the April term, 1918. It is conceded that the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) does not prescribe the time within which a writ of error must be sued out of this court to review the proceedings of the circuit court, but it is contended by defendant in error that while the act provides that a review may be had by this court by writ of error it does not refer to the common-law writ of error; that this proceeding is more in the nature of an appeal on a certificate of importance, and therefore it should be brought to this court for review under the provisions of section 100 of the Practice Act, which would have required the writ to have been made returnable to the February term, 1918. Plaintiff in error, on the other hand, contends that the statute permits the review to be had by writ of error only, and that it should be governed by section 117 of the Practice Act (Hurd's Rev. St. 1917, c. 110), which provides that a writ of error can be sued out of this court to review the proceedings of the trial court any time within three years after the rendition of the judgment or decree. While it is true that it is the evident intention of the Workmen's Compensation Act that a speedy determination be had of all contested claims, it is entirely within the province of the Legislature to designate the manner in which the judgment of the lower court shall be reviewed. While the act provides that a writ of error can be sued out only in cases where the trial court certifies that the case is a proper one to be reviewed, or this court, or one of the judges in vacation, orders that such writ issue, the legislature has not indicated that it did not refer to the common-law writ of error in providing for this method of review. That is the ony wirt of error known to the law, and it must be assumed that this method of review was provided for by the Legislature with the intention that the party complaining would have three years in which to sue out the writ of error. The writ of error was sued out in apt time.

Melvin T. Lewis was a steam fitter. On the day of his death he was directed by his foreman to repair a steam pipe which was leaking in an oven used for drying wood. After he had finished repairing the pipe the doors of the oven were closed and the steam turned on. He then took hold of the cord of an electric light which was used for the purpose of inspecting the inside of the oven and looked inside the oven. He closed the door, and, while standing holding the electric light cord in his hand, fell to the floor and died almost immediately afterwards. A postmortem examination disclosed that the deceased had been a sufferer from myocarditis, or fatty degeneration of the heart, and that his death was caused from dilation of the heart. No one saw the deceased when he fell. It is the theory of defendant in error that he received an electric shock from the electric light cord, which was sufficient, in the weakened condition of his heart, to cause his death. There was very little evidence, although some, to support this theory. The great preponderance of the evidence was to the effect that the deceased died from natural causes.

The evidence introduced before the arbitrator was somewhat voluminous. The arbitrator awarded compensation to the administratrix, and an appeal was taken to the industrial board, where additional evidence was heard. The industrial board rendered a written decision awarding compensation. In its decision the industrial board held, in effect, that it was not bound to render its decision and make its award according to the preponderance of the evidence, and, in effect, stated that it was impossible to tell what caused the death of the deceased, but found, however, as a

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fact that he met his death as the result of an accident which arose out of and in the course of, his employment. When the matter was brought before the circuit court on certiorari, plaintiff in error requested the court to remand the cause to the industrial board with instructions. While the court did not adopt, in the exact form as presented, the instructions suggested by plaintiff in error, it did remand the cause to the industrial board. with the statement, first, that the board had erred in its decision in failing to include in its enumeration of the issues in a compensation case the question whether or not an accidental injury occurred; second, that the board erred in its implied statement that where all the elements in a compensation case are admitted or proven beyond question, except the element of an accidental injury arising out of and in the course of the employment, then the rule of law as to the burden of proving an accidental injury arising out of and in the course of the employment should not be applied; and, third, that the board erred in its statement that it is a legal presumption that the injury was accidental. Upon the re-reference, the industrial board, without hearing any further evidence, again awarded compensation to the administratrix, and the former decision was modified by striking out certain portions, but leaving in it words which plaintiff in error contends are still objectionable.

[2, 3] While it is apparent from its decision that the industrial board had some doubt as to the liability of plaintiff in error to pay compensation in this case and as to just how the deceased came to his death, it did find that he died as a result of an accident which arose out of, and in the course of, his employment on January 22, 1916. It is not within the power of this court to weigh the testimony. If there is competent evidence in the record which supports this finding the judgment of the circuit court must be affirmed.

Plaintiff in error contends that, in reviewing the judgment of the circuit court for the purpose of detemining whether the facts proven support the award, we are bound by the facts as stated in the written opinion of the industrial board. In maintaining this position it cities and relies upon Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110. In that case there was no agreed statement of facts or stenographic report of the evidence in the record. The only facts in the record were the findings made by the industrial board, and, as we stated in that case, our powers of review were limited to a determination, from the facts recited in the decision of the industrial board, as to whether that body acted within its powers in making the award. In this case we have a stenographic report of the evidence taken. Two witnessses testified that they examined the deceased after his death, and found one of his hands burned where he had grasped the electric light cord, as though it had been burned by electricity. At the time he fell deceased was standing on an iron floor which was covered with water to the depth of the soles of his shoes. While the evidence disclosed that the insulation on this electric light cord was in good condition, and no leak in the current could be found by any test made, it was also shown that at times, and under certain conditions, electricity will escape from a cord of this kind when no leakage could be detected either immediately before or afterwards. The current that supplied this cord was what is known as alternating, and physicians testified that a shock from an alternating electric current received by one whose heart was in the condition of that of the deceased is liable to produce dilation, which would result in death. Under this state of the record, as we are not permitted to weigh the evidence the circuit court properly confirmed the award of the industrial board.

The judgment of the circuit court is therefore affirmed. Judgment affirmed.

CARTER, J. (specially concurring). I agree with the conclusion reached in the foregoing opinion on the merits of the case, but I am

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disposed to think there is reasonable ground for holding that, in order to give this court jurisdiction to review the proceedings of the circuit court, this writ should have been sued out at the February term, 1918, of this court. I think there is great force in the argument of counsel for the administratrix that the writ of error, under our statute to review the proceedings of the circuit court in this court, is not a common-law writ of error, but is more in the nature of an appeal. This court has held that a certiorari proceeding under which the award of compensation by the industrial board is reviewed by the circuit court is not a common-law certiorari, but a statutory one; that all proceedings under the Workmen's Compensation Act are entirely statutory; and that a writ of certiorari awarded by the circuit court, or a suit in chancery provided for under the Workmen's Compensation Act, is not an ordinary common-law proceeding, but is governed wholly by the statute. People v. McGoorty, 270 Ill. 610, 110 N. E. 791. It must be conceded that the Workmen's Compensation Act in no way specifically limits the time in which the writ of error should be brought to this court to review the proceedings of the circuit court, and the question here under discussion as to the proper construction of the statute on this point is not free from difficulty. It is one of the many questions that are continually coming before the courts as to the proper construction of statutes where the intention of the Legislature is not clearly shown from the wording of the statute. Beyond question, the Legislature could have specifically limited the time in which this writ of error could be sued out of this court either to the next term of the Supreme Court or to three years.

It seems to me clear, under the wording of the statutes and the decisions of this court in construing other provisions with reference to the Practice Act as to writs of error, that the writ of error referred to in the Practice Act is the common-law writ of error and not the statutory one. Myers v. Newcomb Drainage District, 245 Ill. 140, 91 N. E. 1070; Erlinger v. St. Louis and O'Fallon Railway Co., 245 Ill. 304, 92 N. E. 153. The common-law writ of error is a writ of right, but the writ in a proceeding of this kind is not a writ of right. It is statutory, and such a writ is not a writ of right. Loomis v. Hodson, 224 Ill. 147, 79 N. E. 590; People v. McGoorty, supra, and cases there cited. Clearly, the Legislature did not intend to make this writ of error a writ of right, because it required as a prerequisite to its issuance that the circuit court should first issue a certificate that the case was one proper to be reviewed by the Supreme Court, or, if the trial court refused to so certify, that the Supreme Court during term time, or one of its judges in vacation, could order a writ of error to issue.

In construing a statute on any given question the intention of the Legislature is the law. In finding such intention we must gather it from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. A thing within the intention is regarded within the statute though not within the letter. A thing within the letter is not within the statute if not also within the intention. When the intention can be collected from the statute, words may be modified or altered so as to obviate all inconsistency therewith. In seeking the intention the court will always have regard to existing circumstances, contemporaneous conditions, and the interest or want of interest for the adoption of the statute, together with the thing to be remedied and the object sought to be attained. People v. Highway Comrs., 270 Ill. 141, 110 N. E. 347; Warner v. King, 267 Ill. 82, 107 N. E. 837; Hoyne v. Danisch, 264 Ill. 467, 106 N. E. 341. A statute is passed as a whole and not in parts or sections, and therefore, in order to get the real intention of the lawmakers, the whole act should be studied and construed. Uphoff v. Industrial Board, 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1; People v. Wren, 4 Scam. 269. Previous legislation passed on the

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subject may be helpful, also in ascertaining the intention of the Legislature with reference to the act that is being construed.

The Workmen's Compensation Act was first passed in this state in 1911 (Laws of 1911, p. 314). The provisions for hearing before the arbitrator were somewhat similar to those of the act as it now stands. That law provided that the third arbitrator should be appointed by the county or circuit court of the county where the injury occurred, and also provided in section 10 that the report of the arbitrator should be reviewed in the court that made the appointment by filing within 20 days after the finding of the arbitrator, a petition asking for a review in said court and filing a good sufficient bond approved by the court. There was no provision in the statute at that time with reference to reviewing the finding of the county or circuit court in that regard. The act was amended in 1913, providing for the industrial board substantially as in the present act, and further providing that the Supreme Court should have the power to review the questions of law involved in any such descision if application for such review by this court was made by the aggrieved party with 30 days after the decision or after the filing of a correct statement of facts or a stenographic report with the industrial board. Laws of 1913, par. f, p. 349. This court held that this provision for a review directly by this court of the decision of the Industrial board was unconstitutional (Courter v. Simpson Construction Co., 264 Ill. 488, 106 N. E. 350), and that the only way to review the decision of the industrial board in court was by the common-law writ of certiorari. At the next session of the Legislature this provision of the Workmen's Compensation Act was amended so as to provide that the circuit court of the county where the parties defendant in a proceeding of this kind were found could review by writ of certiorari the finding of the industrial board, and also to provide that the judgment or decree of the circuit court could only be reviewed by the Supreme Court by writ of error upon the certificate of the trial court that the case was one proper to be reviewed by the Supreme Court, or, if the trial court certified that it was not one proper to be reviewed by the Supreme Court, the Supreme Court, in its discretion could order the writ of error to issue. Laws of 1915, p. 410. This amended act also provided that a copy of the decision of the industrial board could be entered in the circuit court of the county in which the accident occurred by either of the parties on 15 days notice to the other parties as to the making of such application for an entry of judgment. The amended act of 1915 also provided that within 18 months after the agreement or award had been decided upon, as stated therein, such award or agreement might be reviewed by the industrial board, at the request of either employer or employee, on the ground that the disability of the employee had recurred, increased, diminished, or ended, 15 days' notice being given as to the hearing on this review. There are several other provisions of this amended act indicating that the Legislature intended to have a final decision in the matter of the award quickly disposed of. The act was again amended at the last session of the Legislature, providing that, if the trial court refused to certify that the cause was one proper to be heard by the Supreme Court, the Supreme Court in term time, or one of the judges of that court in vacation, could order the writ to issue for the review of the proceedings of the circuit court. Both the amendment of 1915 and the amendment of 1917 provided that the review in the circuit court by a writ of certiorari or by chancery proceedings must be commenced within 20 days of the receipt of notice of the decision of the board of arbitration.

Having in mind the history of the legislation in this state on this subject, the various provisions that have been made for the speedy disposition the hearing in the lower court, and the attempt of the Legislature by the act of 1913 to obviate a hearing by intervening courts, and requiring any review to be made directly by the Supreme Court within 30 days from the rendering of the decision, and the various provisions now found in the

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amended act with reference to the speedy disposition of the hearing, both before and after review, it seems most unreasonable to believe that the Legislature intended the whole matter could be held in abeyance during the three years in which the statute provides that a common-law writ of error may be issued out of this court to review the judgment of the trial court. Such an intention would render uncertain the final disposition of the case until after the three years had expired. If the Legislature had ever had its attention called to this question it surely could not have allowed three years for such review in view of the other provisions in the act, which show clearly that it intended to have a speedy disposition of the proceedings, so that the injured person—or, if he was dead, his beneficiaries—could have quick relief under the provisions of the act. As this court has said in a recent decision, the act was passed for the purpose of speedily disposing of claims for injuries with as little expense as possible. Louisville and Nashville Railroad Co. v. Industrial Board, 282 Ill. 136, 118 N. E. 483. Section 100 of the present Practice Act provides that appeals cannot be taken from the decisions of trial courts to the Supreme Court more than 20 days after the date of the entry of the judgment, and that not more than 50 days may intervene between the date of the entering of such order and the term of this court to which the appeal is taken. While the Workmen's Compensation Act calls this proceeding to review a "writ of error," yet it is not a common-law writ of error, because it can only be issued on the order of the trial judge or the Supreme Court or one of the judges thereof, and it is therefore not a matter of right, but a matter of discretion of the court or judge, and is practically an appeal allowed in the discretion of the court or judge rather than a common-law writ of error.

The conclusion reached in this opinion, it seems to me, leads to an unreasonable conclusion as to the enforcement of this law in making the decision of the trial court subject to the common-law writ of error. When great inconvenience or absurd consequences will result from a particular construction of a statute, that construction should be avoided unless the meaning of the Legislature be so plain and manifest that avoidance is impossible. Considering all the provisions of the Workmen's Compensation Act together, it seems to me that it was the plain intention of the Legislature that there should be a speedy, final disposition of all claims for injuries coming within those provisions. It is as reasonable from the letter of the statute to hold that section 100 of the Practice Act should apply as to the time in which a statutory writ of error should be sued out as it is to hold that section 117, as to common-law writs of error, applies to this statutory writ of error. To construe section 100 as applying here is in full harmony with all the other provisions of the Workmen's Compensation Act, and carries out, beyond question, the spirit and purpose of that act. That being so, it would seem that it should be held that this writ of error should have been sued out and brought to the February term, 1918, of this court, and not having been brought until the April term—long after the 50 days expired from the entry of the former judgment—that this court is without jurisdication to review the proceedings under the statutory writ.

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APPELLATE COURT OF INDIANA.

DIVISION NO. 2.

ENTERPRISE FENCE & FOUNDRY CO.

v.

MAJORS. (No. 10286.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —SUBMISSION TO OPERATION.

An insured employee seeking compensation under the Workmen's Compensation Act must submit to an operation which will cure him, when so advised by his attending physician, when not attended with danger to life or health or extraordinary suffering, and he cannot obtain compensation for a permanent impairment resulting from such refusal.

(For other cases see Master and Servent, Dec. Did. § 385[11].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION— SUBMISSION TO OPERATION.

In a proceeding for compensation under the Workmen's Compensation Act for a permanent injury to a hand, claimant's refusal to allow amputation of his finger was not unreasonable or willful misconduct prejudicing additional compensation, where his physician stated that the finger could be saved.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION— INCREASE OF AWARD.

Where compensation for loss of an employee's finger has been awarded by the Industrial Board as provided for by Burns' Ann. St. Supp. 1918, §§ 8020, 8021, the award may be modified and increased upon a showing that the employee's use of hand because of infection had been permanently impaired.

(For other cases, see Master and Servant Dec. Dig. § 419.)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act by Edward Majors, opposed by the Enterprise Fence & Foundry Company, employer. From an award of compensation, the employer appeals. Affirmed.

Orbison & Olive, of Indianapolis for appellant.

W. S. Taylor, of Indianapolis, for appellee.

IBACH, J. Appellee was injured on March 6, 1917, while in the employ of appellant, which injury consisted of a "twist and laceration of the index finger of the right hand." Appellant had actual knowledge of the injury when it was received, made its report of the same at that time, and filed it with the Industrial Board on March 14, 1917. On the 30th of March the parties agreed on the compensation which should be paid appellee, which was $6.81 a week during his total disability not to exceed 500 weeks, and the necessary and reasonable surgical, medical, and hospital expenses occasioned by the injury during the first 30 days thereafter. This agreement was approved by the board on April 2, 1917. On the 19th of April appellee's

*Decision rendered, Nov. 26, 1918. 121 N. W. Rep. 6.

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injured finger was amputated at the middle joint. At that time the parties entered into a supplemental agreement pursuant to sections 8020, 8021, Burns' Supp. 1918, wherein appellant agreed to pay appellee for a period of 15 weeks the sum of $6.81 each week, which was 55 per cent. of his average weekly wage. This agreement was likewise filed with the Industrial Board, and approved by it April 26, 1917. Appellant has fully paid the compensation provided for in such supplemental agreement.

On September 10, 1917, appellee filed petition with the Industrial Board which he terms his "Application for Adjustment," and in which he asks for a review of the agreed reward of April 19, 1917. The material averments of his petition are that as a result of his injury the second and ring fingers of his right hand were left stiff and permanently injured. This petition was subsequently heard by the full board, and an award made granting to appellee 22½ weeks' compensation at the rate of $6.81 per week to be paid in cash in a lump sum. It is from this award that appellant appeals and contends: (1) That the Industrial Board had no legal power to make appellee an additional award after the agreement of April 19, 1917, which agreement was fully executed by the parties in settlement of his claim and in all respects in conformity with the rules of the board more than seven days after the accident and duly approved by the board, and that there was no change of condition so far as the extent of the injury was concerned subsequent to the execution of such agreement. (2) That appellee cannot recover compensation for a permanent injury to his hand when said permanent injury was due to his refusal to permit the attending surgeon to perform a surgical operation not of itself dangerous or attended with extraordinary suffering which if it had been performed when it was advised, would have prevented infection and saved the permanent impairment now complained of.

[1] We will first dispose of apellant's second contention. The law seems to be well settled that an injured employee seeking compensation must submit to an operation which will cure him when so advised by his attending physician, when not attended with danger to life or health or extraordinary suffering, and, if as a result of such refusal on his part he suffers a permanent impairment, the employer will not be required to compensate him for the resulting permanent impairment. 1 Honnold, W. C. 525; Jend. s v. Detroit Steel Products Co., 178 Mich 265, 144 N. W. 563, L. R. A. 1 16A, 381, Ann. Cas. 1915D, 476.

There is evidence in this case, and the Industrial Board found:

"That at the time of the injury the attending surgeon employed by appellant t first advised the amputation of appellee's index finger. That appellee remonstrated and insisted that the finger should be saved if possible, and, in response to the objection of appellee, the attending physician advised that he had saved fingers as badly injured as that of appellee, and it was agreed to make an effort to save the finger. The finger was not amputated at that time, but was treated for some period in an endeavor to save it. That infection developed which involved practically the whole of plaintiff's right hand, and made necessary the amputation of the index finger, which was amputated at the middle joint. * * * That the infection developed because of the delay in the amputation. That the plaintiff's refusal to accept the amputation at the time of the injury was made in good faith with a view of saving the finger if possible. That his refusal was not willful, stubborn, or without reason."

[2] It would therefore seem to follow that appellee's insistence that his finger be saved if possible, when taken with the statement made by the surgeon, was not such unreasonable or willful misconduct as would prejudice the allowance of additional compensation.

We are satisfied that the further contention of appellee has been determined by this court. In re Stone, 117 N. E. 669. In that case it it said:

"Where the Industrial Board has approved an agreement under the Workmen's Compensation Act, it still has jurisdiction of the subject-mat-

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ter, even if the agreement was intended as a compromise settlement of all compensation, and may consider all disputes with reference to compensation to be paid at any time before the case is finally disposed of."

In this connection, the Industrial Board has found, in addition to what we have already set out:

"That on the 19th day of April, 1917, plaintiff and defendant entered into a supplemental compensation agreement providing for the payment of 15 weeks' compensation at the rate of $6.81 per week for the loss of the index finger of the right hand at the middle joint; that pursuant to said agreement the defendant had paid to plaintiff 15 weeks' compensation at the rate of $6.81 per week; that, because of the amputation of the index finger at the middle joint, the adhesion of tendons, and permanent stiffness especially in the middle and second fingers of the right hand, the natural use and function of the whole said hand has been permanently impaired."

[3] It is clear, we think, that by the supplemental agreement appellant intended to and did pay for the loss of appellee's index finger as provided for by said sections 8020, 8021, Burns' Supp. 1918. Nothing was allowed or paid for permanent or temporary partial disability thereafter, if any resulted to appellee's hand and other fingers. The evidence shows and the finding is that appellee's second and ring fingers were "left stiff" owing to an infection, consequently a partial permanent injury resulted to such fingers, and no such injury was contemplated or considered in the agreed award of April 19, 1917. Such award was doubtless considered sufficient for the injuries as they then existed, but a change in such condition and an increase in appellee's disability were properly considered by the Industrial Board upon the petition filed by appellee, and there is no dispute in this appeal that appellee's petition was timely and properly filed. Under all the evidence, we are satisfied that the Industrial Board was justified in reaching the conclusion that appellee's second and ring fingers had become in part permanently impaired after the agreed award, and it was warranted in granting the award which is here appealed from.

Award affirmed.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

BACHMAN

v.

WATERMAN. (No. 9959.)*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION — "PLACE OF WORK."

Where it is necessary that an employee travel the public streets in doing the work he was hired to do, his place of work includes such public streets as he is required to traverse while doing the work.

(For other cases, see Master and Servant, Dec. Dig. § 375 [1].)

(For other definitions, see Words and Phrases, First and Second Series, Place to Work.)

* Decision rendered, Nov. 26, 1918. 121 N. E. Rep. 8.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT.

Where a flour salesman, whose duty it was to solicit orders and to telephone them to his employer, was struck by an automobile while crossing a street, evidence *held* to justify a finding that he was crossing the street in order to solicit from another customer, and that he was still engaged in his duties when struck.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW—PRESUMPTIONS.

In proceedings for compensation under the Workmen's Compensation Act, it is the province of the Industrial Board to draw inferences from facts proven and on appeal it will be assumed that the board drew those permissible deductions of fact that support the award.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—OUT OF AND IN COURSE OF EMPLOYMENT.

Where a flour salesman was injured by an automobile while crossing a street on his way to board a car to return to his home, from which it was customary for him to telephone orders for goods to his employer, the injury arose out of and in the course of the employment.

(For other cases, see Master and Servant, Dec Dig § 375[2].)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act by Mary E. Waterman for compensation for the death of Lee F. Waterman, her husband, opposed by Valentine Bachman, employer, and Millers' Mutual Casualty Insurance Company, insurance carrier. From an award of compensation, the employer and insurance carrier appeal. Award affirmed, with damages.

Harvey & Austill and Joseph W. Hutchinson, all of Indianapolis, for appellants.

Davis, Moore, Cooper, Royse & Bogart, of Terre Haute, for appellee.

CALDWELL, J. Appellants Valentine Bachman and his insurance carrier challenge the sufficiency of the evidence to sustain the finding of facts. There was evidence to the following effect:

Bachman operated a flour mill in Indianapolis. On and for two years prior to December 26, 1916, Lee F. Waterman was in his employ as a salesman. The duties of his employment required him to visit grocery stores and various other places of business in Indianapolis and the surrounding territory, for the purpose of taking orders for flour and other mill products, and also for the purpose of making collections for products theretofore sold and delivered. He had regular customers, both within and without the city, on whom he was expected to call at stated intervals. It was also a part of his duty to visit others than regular customers and endeavor to take their orders for mill products.

The particular time at which he should call on his customers and prospective customers was left largely to his own judgment and convenience. On Mondays and Tuesdays he usually canvassed certain territory within the city; on other days territory without the city. As a rule he traveled from place to place and from customer to customer in a small automobile owned and furnished by his employer. When for any reason the automobile could not be used, he walked or rode on the street cars. On those days when he canvassed within the city, his custom was to phone

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his orders before 6 oclock in the evening from his home to the mill office. This custom was understood by Bachman's bookkeeper, whose duty it was to receive such orders. The office closed at 6 o'clock. Waterman lived on East 16th street. It required about 20 minutes to travel on the cars from the point where he was injured as hereinafter described to his home. From such point he could have reached his home over either the Central Avenue or the College line.

On the afternoon of December 26, 1916, he visited a number of customers in the north central part of the city, taking orders and making collections. The automobile which he had been using was out of repair, and he therefore proceeded on foot. At 4:30 p. m. he visited Maloy's grocery, on North Alabama street, taking an order and making a collection. He left Maloy's at about 4:50, and proceeded about two blocks, to the intersection of Michigan and New Jersey streets with Massachusetts avenue. Michigan street extends east and west; New Jersey street, north and south; Massachusetts avenue, northeast and southwest. At about 4:55 p. m. Waterman reached a point on northwest side of Massachusetts avenue immediately west of the intersection. He thereupon started southward across the avenue. A college Avenue car, headed northeast, towards his home, stood in Massachusetts avenue, just west of the intersection, receiving and discharging passengers. On the southeast side of Massachusetts avenue is Lowe's grocery. Bachman's bookkeeper testified that she did not remember that any orders had ever been received from Lowe's but that money had been received from there. There were a number of groceries in the vicinity of the intersection, the proprietors of which were possible customers. As waterman proceeded across the avenue, he was going in the direction of the College avenue car, and also in the direction of Lowe's grocery. It was observed that he proceeded hurriedly, giving certain witnesses the impression that he was hastening to catch the car. His apparent haste, however, possibly may be accounted for by another circumstance:

As he started across the avenue, two automobiles were approaching from the northeast—the first at a rapid rate of speed, near the curb; the second following near the center of the avenue. It was apparently necessary for him to hasten to avoid being struck by the first automobile. As he hastened out from in front of it, he was struck by the second, near the front end of the College Avenue car. As a consequence he suffered injuries from which he died in a few days. Appellee was his dependent wife, and is now his widow. He had not phoned to the mill office his orders for the day. Bachman's bookkeeper waited after closing time to receive such orders, but by reason of the accident no message conveying them was transmitted or received. Several days after the accident a book found on Waterman's person, containing the orders and an account of collections, was delivered at the office. There was evidence that Waterman, when canvassing in the city, always phoned his orders from his home, and that it was his custom to reach his home in time to perform that duty before the office closed at 6 o'clock. There was no direct evidence indicating his immediate purpose in crossing the avenue. Whether he was proceeding to call on other customers, or prospective customers, rather than endeavoring to catch the car for the purpose of going home, is left to inference.

Appellants contend that under the evidence it does not affirmatively appear that the accident which resulted in Waterman's death arose out of or in the course of his employment.

This court is committed to the following doctrine: That an injury is received in the course of the employment when it is suffered while the workingman is doing what he was hired to do; that it arises out of the employment when it appears that there is a causal connection between the environments of the employment and the resulting injury; that such causal connection is not indicated by the mere fact that a workman's

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employment required him to be at a certain place at a certain time, and while there he was injured, but it must appear also that the nature of his employment subjected him at such place to a certain danger, although not foreseen, and that by reason of being subject to such a danger, he was injured; that under the Workmen's Compensation Act (Acts 1915. c. 106) an employee's place of employment is sufficiently comprehensive to include all the territory that he is required to visit in performing the duties of his employment; that, where the duties of his employment require him to travel public streets, the perils and hazards incident to travel thereon, such as the danger of coming in contact with moving vehicles, becomes a part of the environment in which he is required to work. In re Harraden, 118 N. E. 142; In re Betts, 118 N. E. 551.

[1] It was necessary for Waterman to travel the public streets in doing the work which he was hired to do. It results that his place of work included such public streets as he was required to and did traverse while doing such work. Since vehicles of conveyance also continuously pass to and fro along the public streets, the passage of such vehicles, with the consequent peril, became an ever-present incident of his employment, and constituted a part of the circumstances in the midst of which he was required to work. While traversing a public street he received his fatal injuries, by coming in contact with such a vehicle. If at the time the duties of the day under his employment had not been completely performed, but, on the contrary, he was still doing the work he was hired and expected to do, if in his employer's interest he was proceeding to call on a customer or prospective customer, or if he was moving to wind up his day's work in a manner expressly or tacitly required and expected by his employer, then it follows that he was injured by an accident arising out of and in the course of his employment. See the following: In re Harraden, supra; Beaudry v. Watkins, 191 Mich. 445, 158 N. W. 16, L. R. A. 1916F, 576; Globe, etc., Co. v. Industrial Co. (Cal. App.) 171 Pac. 1088; Putnam v. Murray, 174 App. Div. 720, 160 N. Y. Supp. 811; Kunze v. Detroit, etc., 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A, 252; Bett v. Hughes, 8 B. W. C. C. 362; Pierce v. Provident, etc., Co., 4 B. W. C. C. 242; McNiece v. Singer, etc., Co., 4 B. W. C. C. 351; Refuge, etc., Co. v. Millar, 5 B. W. C. C. 522.

[2, 3] Decedent completed his business with a customer about 4:50 p. m. Five minutes later he started across the avenue. His purpose in so doing, and consequently his exact relation to his daytime duty of canvassing for orders, are somewhat uncertain. The circumstances would seem to be sufficient, however, to justify some deduction of fact. Since he was moving in the direction of a standing street car, which would have carried him to the vicinity of his home, had he embarked on it, perhaps it might reasonably be implied that such was his intention, and consequently that he had completed his canvassing for that day. But, assuming that the situation would justify such a deduction, if made by the proper tribunal, there is another equally or more reasonable. Thus about an hour yet remained before the time at which he usually arrived at his home. About 20 minutes were required to make the trip. While he was going in the direction of the standing car, he was going also in the direction of the place of business of a prospective customer, perhaps a customer, since money had been received from that place. Other prospective or possible customers were in the vicinity. Under the circumstances we believe the inference to be reasonable that he was still engaged in the canvassing duties of the day. It is the province of the board to draw legitimate inferences from facts proven. Of permissible deductions of fact, we must assume that the board drew those that are in harmony with and support the award. See Kunze v. Detroit, etc., Co., supra.

Moreover, assume that Waterman had completed his canvassing for the day, and that it was his intention to board the street car for the pur-

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pose of being carried to his home: He had taken a number of orders that day, as evidenced by memoranda found on his person after the accident. These orders had not yet been phoned in to the office of his employer. It was his custom, possibly for purposes of business privacy, to perform this duty after he arrived at home. It was also his custom to reach his home to that end, and that he might report his orders before the office closed at 6 o'clock. His employer knew of such custom, was satisfied with and relied on it, and at least tacitly required that it be followed. On such assumption it appears that, while Waterman had completed the more substantial labors of the day, a further duty to his employer and incident to the employment remained undischarged. He was injured while proceeding in the customary way to the performance of such duty.

[4] Under the facts this case is not governed by those decisions wherein it appears that a workman was injured while returning from or going to his place of work, the day's duties being completed or not yet commenced, but rather by that other line, wherein, the day's service in its general scope being completed, there yet remains some other incidental duty; the workman being injured while performing it. In such cases it is held that the injury arises out of and in the course of the employment. Among cases that might be cited see the following: Duffield v. Purs, 32 D. L. R. 339; Papinaw v. Grand Trunk Co., 189 Mich. 441, 155 N. W. 545; City of Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327; Grieb v. Hammerle, 222 N. Y. 382, 118 N. E. 805.

This court has held that an injury received by a switchman after he had completed his hours of active service, and while he was proceeding to perform the incidental duty of registering out, was suffered in the course of his employment. Inland Steel Co. v. Lambert, 118 N. E. 162.

The Duffield Case, supra, is to the effect that a sales agent, who, while delivering his employer's goods, traveled from place to place by means of a horse and conveyance provided by the employer, is acting within the scope of his employment when taking the horse to the stable after the completion of the day's work.

The evidence is sufficient to sustain the finding.

Award affirmed, with 5 per cent damages, as provided by act of 1917. Acts of 1917, p. 154.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

NEW CASTLE FOUNDRY CO.

v.

LYSHER. (No. 9768.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —COURSE OF EMPLOYMENT—BURDEN OF PROOF.

One claiming compensation under the Workmen's Compensation Act has the burden of proving that injury complained of resulted from an accident arising out of and in the course of his employment.

(For other cases. see Master and Servant Dec. Dig § 403.)

* Decision rendered, Nov. 21, 1918. 120 N. E. Rep. 713.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ARISING OUT OF EMPLOYMENT—EVIDENCE.

In proceeding for workmen's compensation, evidence, together with the proper inferences therefrom, *held* to sustain finding that the injury resulted from an accident arising out of and in the course of the employment.

(For other cases, see Master and Servant Dec. Dig § 405[4].)

Appeal from Industrial Board.

Proceeding by Charles Lysher under the Workmen's Compensation Act, opposed by the New Castle Foundry Company, employer. From an award of compensation by the full Industrial Board, the employer appeals. Affirmed.

Taylor, Carter & Wright and Solon J. Carter, all of Indianapolis, and D. P. Williams, of Pittsburgh, Pa., for appellant.

W. R. Myers, of Shelbyville, and Chester M. De Witt, of New Castle, for appellee.

FELT, P. J. This is an appeal from an award made by the full Industrial Board of Indiana. The record did not reach the court until October 29, 1918.

Appellant moved for a new trial, but in its reply brief abandons any alleged error based thereon, because of the holding of this court that a motion for a new trial is not necessary or proper under the Indiana Workmen's Compensation Act (Laws 1915, c. 106). Union Sanitary Mfg. Co. v. Davis, 114 N. E. 872.

Appellant had made numerous assignments of alleged error, but the assignments that the decision of the Industrial Board is not sustained by sufficient evidence and is contrary to law present the only questions available to appellant, and others need not be considered. Bimel Spoke & Auto Wheel Co. v. Loper, 117 N. E. 527-529.

The full Industrial Board made a finding of facts and an award as follows:

"And the full board, having heard the argument of counsel for the defendant and having reviewed the evidence and being duly advised in the premises, finds that on the 19th day of February, 1916, plaintiff was in the employment of the defendant at an average weekly wage of $10.75; that on said date the plaintiff received a personal injury by an accident arising out of and in the course of the employment, resulting in a 75 per cent. permanent impairment of the sight of his right eye with glasses; that on the 28th day of February, 1916, the plaintiff served upon the defendant written notice of his injury; that the defendant had been personally notified that said injury on the 23d day of February, 1916, and that the defendant provided the plaintiff with an attending physician during the first 30 days after the injury; that notwithstanding the fact that the defendant had personal notice and was served with written notice of the plaintiff's injury, and provided him an attending physician, said defendant has wholly failed to file any accident report herein.

"Award.

"It is therefore considered and ordered by the full Industrial Board that the plaintiff be and is hereby awarded, against the defendant, 75 weeks' compensation at the rate of $5.91 per week, beginning on the 5th day of March, 1916.

"Dated this 2d day of September, 1916."

Appellant states that:

"There is but one big issue in this case, and that is whether or not

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there rested upon appellee the burden of proving at the hearing that he suffered an accidental injury arising out of and in the course of his employment which resulted in the loss of nine-tenths of the sight of his eye, and if there existed such a burden, was it discharged by appellee."

[1] The burden is placed upon the one claiming compensation under the act in question to prove that the injuries complained of resulted from an accident arising out of and in the course of the employment of such person. Union Sanitary Mfg. Co. v. Davis, 115 N. E. 676; Haskell & Barker Car Co. v. Brown, 117 N. E. 555; Bucyrus Co. v. Townsend, 117 N. E. 656.

That the injury in any particular case resulted from an accident arising out of and in the course of the employment of the injured employee may be shown by direct proof, or may be proven by facts and circumstances which reasonably authorize the board to infer therefrom that the injury complained of was so received. C., C., C. & St. L. Ry. Co. v. Starks, 58 Ind. App. 341, 355, 361, 106 N E. 646; Haskell & Barker Car Co. v. Brown, supra; Ropp v. Fulton, 183 Ind. 251—263, 108 N. E. 946; Bimel Spoke & Auto Wheel Co. v. Loper, supra.

There is no dispute in this case about the fact that appellee was employed by appellant, and that he suffered an injury to his right eye from some cause.

Appellant asserts, however, that there is a total failure of proof tending to show that the condition of appellee's eye was due to an accident, and also that, if it be shown that the condition of the eye was due to an accident, the proof wholly fails to show that the accident arose out of or in the course of his employment by appellant.

There is evidence tending to prove that appellee was employed by appellant, and that he worked at unloading cars and chipping and cleaning metal castings; that on or about the 19th of February, 1916, while working in the foundry, in the dust, some hard substance entered his eye; that he continued to work, the eye pained him some in the afternoon of that day, became inflamed, and was observed and commented upon by persons whom he met on that evening and on the following day; that on February 20th he consulted Dr. E. S. Ferris, an eye specialist, who was employed by apellant in appellee's case; that Dr. Ferris removed a hard substance from the anterior surface of the cornea of appellee's right eye; that the eye was inflamed at that time and subsequently became infected and he lost vision until it was only one-tenth of normal strength.

Dr. Ferris testified that his records show that he removed the substance from appellee's eye on February 24th, and did not recall seeing him prior to that date, though he could not always rely on the fact that his entries were made on the day the service was rendered which occasioned the entry.

He also testified that he carefully sterlized the instruments he used in operating on appellee's eye; that the lining of the lid of the eye invariably carries various bacteria, and the eye is very susceptible to infection; that sometimes all that is necessary is a very little break in the delicate membranes of the eye to produce an infection; that in this case the infection resulted in a sluffing ulcer that finally involved all the layers of the cornea; that the infection reached the anterior chamber, and there was pus formed in that chamber; that the condition of appellee's eye when he first saw it would not have suggested such an infection, but it depends largly on the resistance in the indvidiual; that there was no infection in appellee's eye when he removed the hard substance from it, but the infection developed subsequently during the first week following the operation.

Appellee testified that his eye was hurt at the foundry on Saturday, because his eyes were clear in the morning and pained him in the evening and on the day following; that he spoke to Mr. Davis, the foreman,

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and the company furnished him groceries of the value of $34 and money to the amount of $8 while he was suffering from the injury.

The evidence also shows that on February 28, 1918, appellee notified appellant in writing that while in appellant's employment on February 19, 1918, his eye was injured by a chip from a casting flying into his right eye while he was at work chipping and cleaning iron castings.

There was also other evidence tending to prove that appellee's eye pained him and was badly inflamed shortly after he got the substance in it at the foundry, and that he saw the doctor very soon afterwards.

There was also evidence tending to prove that appellee drank intoxicating liquor while he was taking treatment for his eye; that he had taken the Keeley cure, and that he had been sentenced to serve a term in jail for public intoxication; that a person who uses intoxicating liquor has less resistance to disease, and is more liable to infection than persons who are free from the effects of intoxicating liquors.

The full Industrial Board made a finding which authorizes the award made to appellee.

[2] The evidence and the inferences that may fairly and reasonably be drawn therefrom sustain the finding without resorting to inferences drawn from other inferential facts. United Paper Board Co. v. Lewis, 117 N. E. 276; In re Bowers, In re Williams, In re Colan, 116 N. E. 842; Indianapolis Abattoir Co. v. Coleman, 117 N. E. 502; C., C.. C. & St. L. R. R. Co. v. Starks, supra.

The award of the full board is affirmed.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

JOHN A. SHUMAKER CO., et al.

v.

KENDREW. (No. 10317.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —MEDICAL AND HOSPITAL EXPENSES—CONSTRUCTION OF STATUE.

Where injured employee was furnished physician during week following accident, but after apparent recovery and some months after accident required further medical attention because of tumor resulting from injury, employer was not required to reimburse employee for surgical and hospital expenses in treatment of tumor; such expenses not having been contracted during the 30 days immediately following injury, under Workmen's Compensation Act, § 25, requiring employer to pay such expenses during "first thirty days," and such statute not contemplating full 30 days of treatment intermittent in character but only such treatment as is required during the first successive 30 days.

(For other cases, see Master and Servant Dec. Dig § 385[16].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MEDICAL EXPENSES—"INJURY."

Workmen's Compensation Act, § 25, making employer liable for injured employee's medical and hospital expenses during the 30 days after "injury," construed so that the 30-day period commences with actual disability of employee and not with accident, so that, if disability is not

* Decision rendered, Nov. 20, 1918. 120 N. E. Rep. 722.

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concurrent with accident, the period does not start running until medical attention becomes necessary.

(For other cases, see Master and Servant Dec. Dig § 385[16].)

(For other definitions, see Words and Phrases, First and Second Series, Injury.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —MEDICAL EXPENSES.

Where medical attention was given, employer was not liable for hospital and medical expenses not contracted during the following 30 days, the injury under Workmen's Compensation Act, § 25, having taken place at such time, though after expiration of the 30 days and after having apparently recovered, a tumor developed in employee's leg as a result of injury.

(For other cases, see Master and Servant Dec. Dig. § 385[16].)

Appeal from Industrial Board.

Proceedings under Workmen's Compensation Act by John Kendrew against the John A. Shumaker Company, employer, and others. From an independent order of the Industrial Board awarding employee a sum for hospital and surgical expenses in addition to the compensation agreed on between parties, employer and others appeal. Reversed.

J. W. Fesler, Harvey J. Elam, Howard S. Young, all of Indianapolis, for appellants.

HOTTEL, J. This is an appeal from an award of the Industrial Board of Indiana in which it approved a claim filed by appellee for medical and hospital expenses incurred and paid by him seven months after the accident which resulted in his injury. The undisputed facts pertinent to the question involved, as disclosed by the stipulations of the parties and the findings of the board, are as follows: On August 31, 1916, appellee was in the employ of appellant Shumaker Company and, on that day, received a personal injury by an accident "arising out of and in the course of his employment, which at the time consisted apparently of a surface bruise of the left leg below the knee." As a result of said injury, appellee was disabled for work for a period of one week and was, at the time, provided with physician furnished by appellants. This physician attended appellee on August 31, 1916, and on September 2, 1916, and on said occasions treated the surface bruise on appellee's left leg, which was then the only injury susceptible of diagnosis. This treatment was of a character such as the apparent injury required and was all that said injury appeared to require. The physician was paid in full by the employer. Afterwards, as a result of the injury sustained on August 31, 1916, a tumor or bursa developed in the deeper structures of appellee's left leg, which became "so pronounced that it was diagnosed as such on the 28th day of March. 1917." Appellee then informed the foreman under whom he worked of the condition of his leg, but appellants did not furnish him with the necessary surgical or hospital supplies and services required for the treatment of his injury as then diagnosed. Appellee thereupon provided for the proper treatment at an expense to himself of $35 for surgical services and $65 for hospital charges, no part of which has been repaid to him by appellants. The parties agreed to a compensation allowance of $12.90 a week, beginning on April 11, 1917, and continuing during total disability not to exceed 500 weeks, and it is from an independent order of the Indusrial Board allowing appellee the further sum of $90 for hospital and surgical expenses, that this appeal is prosecuted.

It is contended by appellants that on the expiration of 30 days from

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August 31, 1916, their liability to furnish an attending physician and to provide hospital service ceased; and that this is so notwithstanding the admitted facts showing that, after the slight injury which was discovered and treated at the time of and immediately following the accident there later developed as a direct result thereof a more serious condition which was not susceptible of diagnosis and treatment during the period of the first attendance of the physician. Appellants rely in and cite the following cases in support of their contention: In re Henderson 116 N. E. 315; Born & Co. v. Durr, 116 N. E. 428; Epsten v. Hancock-Epsten Co., 101 Neb 442, 163 N. W. 767; McMullen v. Gavette Const. Co., 200 Mich. 203, 166 N. W. 1019; In re Carroll 225 Mass. 203, 114 N. E. 285.

We deem it unnecessary to enter into a lengthy discussion of the question here presented or of the cases cited by appellants in support of their contention, since we are of the opinion that their position is sustained by the language of the Workmen's Compensation Act. Section 25 of that act provides that—

"During *the* thirty days after an injury the employer shall furnish or cause to be furnished free of charge to the injured employee * * * an attending physician * * * and in addition such surgical and hospital service and supplies as may be deemed necessary by said attending physician, or the Industrial Board."

It is further provided in the same section that—

"If in an emergency [or] on account of the employer's failure to provide the medical care for the *first* thirty days, as *herein specified,* or for other good reason, a physician other than that provided by the employer is called to treat the injured employee during the first thirty days. the reasonable cost of such service shall be paid by the employer subject to the approval of the Industrial Board." Acts 1915, p. 398. (Our Italics.)

[1] It will be observed that this act does not provide for or require such emergency or other treatment by a physician, as the development of an injury may from time to time make necessary; nor does it require or contemplate full 30 days' treatment, intermittent in character and given at such times as the progressive development of an injury may require. On the contrary, the act specifically limits the liability for medical treatment to a period covered by the *first* 30 days after the injury. We find nothing in the act under consideration, or in the authorities construing that act or similar acts in other jurisdictions, which can be said to warrant a holding that, in order to cover the different phases of a progressive injury, the period of the medical treatment at the expense of the employer may be divided into parts, some of which may reach into a period beyond the first 30 days following the injury. This court has given to the section under consideration an interpretation which, impliedly if not expressly, holds to the contrary. In re Henderson, supra; Born & Co. v. Durr, supra.

In this connection, the case of In re McCaskey, 117 N. E. 268, is referred to by appellant, and although it is not contended that said case is controlling in the present instance, the suggestion is made that an erroneous rule or principle is announced therein and should be modified in this opinion, which involves the same principle. The contention is that in the McCaskey Case this court erroneously held that under the Workmen's Compensation Act an "injury" occurs only at the time of disability, whereas, in fact, a proper interpretation of said act makes the injury concurrent in point of time with the "accident" which causes it and that any period of time which runs from the date of the injury must necessarily run from the date of the accident which causes that injury. Appellants' statement of the holding in the McCaskey Case is rather broad, but we recognize that there is authority which tends to support their contention as to a proper intepretation of the Compensation Act. Duffy v. Town of

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Brookline, 226 Mass. 131, 115 N. E. 248; In re Carroll, 225 Mass. 203, 114 N. E. 285; McMullen v. Gavette Const. Co., 200 Mich. 203, 163 N. W. 1019; Cooke v. Holland Furnace Co., 200 Mich. 192, 166 N. W. 1017; Smith v. Solvay Process Co., 100 Kan. 40. 163 Pac. 645.

In the McCaskey Case, we directed attention to the fact that, in fixing the period during which the employer should furnish medical service for an injured employee, the Legislature has designated the 30 days following the injury, rather than the 30 days following the accident, and we there said, at page 269 of the opinion:

"The language of the statute, and justice and reason alike, authorize the conclusion that the services of an attending physician for which compensation was intended was a service to be rendered after there was an actual known physical injury; and hence where, as in this case, the undisputed facts show an accident to an employee in the presence of his employer, the immediate effects of which are not such as to indicate to either employer, or employee, any disability within the meaning of the act in question or any injury requiring the services of attending physician as provided in said act, and such physician is, at the time, neither asked for or called by the employee, nor furnished by the employer, and it turns out later that the injury resulting from such accident is more serious than was at first thought, and in fact such as results in a disability of the employee within the meaning of the statute here involved, the 30-day period during which the employer must, under said section 25, supra, of this act, furnish an attending physician, begins to run when the disability to the employee within the meaning of the act in question develops from such injury.

[2-4] The effect of this holding is to say that the word "injury," as used in section 25, means an injury which results in a disability contemplated by the Compensation Act, and that so long as such injury is one which both the employer and the employee regard and treat as not requiring the services of a physician, and therefore not contemplated or covered by the provisions of section 25, it should likewise be so treated by the Industrial Board; that in such a case the period during which an attending physician must be provided begins to run when an actual disability to the employee, within the meaning of the act, develops from such injury. This holding, if section 25 alone is looked to, may appear to be open to the criticism that it is judicial legislation; but we think that this objection disappears when the entire act, and its purpose and scope, are taken into account. In construing any act its general purpose and scope should not be overlooked, and there can be no doubt but that the purpose and scope of the act in question is to cover and provide compensation for those injuries alone which result in disability to the employee, and that the word "injury," as used in section 25 of said act, is to be so construed. It seems to us to be in perfect and complete harmony with the intent, purpose, and spirit of the act, and not necessarily out of harmony with the letter thereof, to say that when the injury resulting from an accident is such that both the injured employee and the employer, at the time, regard and treat it as one of little or no consequence and as not requiring the attention of a physician and as not of the kind or character contemplated by the act, and later developments show an injury which does fall within the scope of said act and one which does require the services of a physician or surgeon, the date for computing the time from which medical attention must be furnished, in such a case as in all others, is the date when the "injury" develops within the meaning of the act, and this is so even though the development of such an injury is delayed 30 days or more after the happening of the accident which causes it. We see no reason or occasion, therefore, for overruling or modifying the opinion in the McCloskey Case. There is nothing in that case, however, that can be said to support the conclusion reached by the Industrial Board in the present instance. The facts agreed on by the parties and the finding

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of the board itself show that there was an "injury" at the time of the accident which required and received the attention of a physician, and, for the purposes of this case, the time of the injury and the time of the accident are concurrent. In cases where such events are not concurrent and and are not the subject of agreement, their determination, of course, presents issues of fact for the consideration of the board; but in this case no such issue is presented. The 30-day period here began to run on August 31, 1916, and there is no authority in the statute, express or implied, which authorizes an allowance for the expense of a physician or hospital service incurred more than 30 days thereafter.

The award of the Industrial Board is therefore reversed.

SUPREME COURT OF IOWA.

SECHLICH

v.

HARRIS-EMERY CO. (No. 32160.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYMENT OF CHILD.

A department store company, by its void contract employing a girl under 14 years of age, could not limit its liability for injury to her to the compensation fixed by the Workmen's Compensation Act, to which she was incapable of giving consent.

(For other cases, see Master and Servant Dec. Dig. § 366.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ILLEGALITY OF EMPLOYMENT.

Misstatement by girl under 14, in order to secure employment that she was older, is no defense to her employer, sued for injury to her, and claiming only remedy is under Workmen's Compensation Act, despite illegality of employment; prohibition against employment of child under 14 being absolute.

(For other cases, see Master and Servant Dec. Dig. § 366.)

Appeal from District Court, Polk County; Thos. J. Guthrie, Judge.

Action at law. The material facts are stated in the opinion. Affirmed.

Stipp, Perry, Bannister & Starzinger, of Des Moines, for appellant.

Jordan & Jordan and Miller & Wallingford, all of Des Moines, for appellee.

WEAVER, J. Kate Sechlich, a girl under 14 years of age, was employed by the defendant to perform service in its department store in the city of Des Moines. While so engaged the girl fell into the shaft of an elevator used in the store and was killed. This action is brought to recover damages to the estate of the deceased, on the alleged ground that

* Decision rendered, Nov. 16, 1918. 169 N. W. Rep. 325.

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the death of the intestate was caused by the negligence of the defendant. The charge of negligence includes the following specifications:

(1) Failure to provide and maintain a safe place to work.

(2) Employing a child of tender years contrary to law and without the consent of her parents.

(3) Failure to give the deceased proper instruction and warning.

(4) Overloading the deceased with bundles and packages, thereby preventing her from seeing the danger to which she was exposed.

(5) Leaving the elevator shaft unguarded.

(6) Employing an unskilled, negligent and incompetent operator of the elevator.

To this petition the defendant demurred, on the ground that the court was without jurisdiction to hear or try this case, and that the recovery, if any, is to be had by applying for compensation under the provision of the Workmen's Compensation Act (Acts 35th Gen Assem. c. 147). The demurrer was overruled, and thereupon defendant filed an answer, in which, after denying the petition generally, it admits its ownership and operation of the store above mentioned; admits that on February 17, 1917, it employed Kate Sechlich to perform service in said store, where she remained until March 7, 1917, when she was injured. It is further alleged that before she entered said service the deceased applied to defendant for employment, stating and representing that she was of the age of more than 15 years, and that defendant, believing and relying upon such representation, did enter into a written agreement or promise to give her employment, and agreed to return her work permit at the expiration of such employment in case one was issued by the proper authority. It further alleged that, having obtained the said written agreement of the defendant, the deceased went to the proper officer, who issued her a permit allowing her to enter the defendant's employment, and stating the date of her birth to be September 1, 1901, thus making it appear that she was then more than 15 years of age; and thereafter the defendant, in good faith believing that the girl was more than 15 years old and that, if injured in its service, she would accept compensation therefor according to the provisions of the Workmen's Compensation Act, did take her into its said employment. The answer further alleges that the parents of the girl knew she was employed in defendant's store, and not until some time after her injury did they make any claim that she was under 15 years of age, or that she had been unlawfully employed. It is also pleaded that defendant has at all times been and now is ready and willing to pay and make compensation for the injury and death of Kate Sechlich acording to the terms and provisions of the compensation Act.

Plaintiff attacked the answer by motion to strike therefrom as immaterial all the matter therein alleged and pleaded, except its admission and denials of matters stated in the petition. The motion was sustained, the matter objected to was stricken from the answer, and defendant appeals.

[1, 2] I. If the deceased was under 14 years of age, then defendant could not lawfully take her into its employment. This we do not understand is denied by counsel. They contend, however, that while such violation of the statute, if in fact it was violated, might render defendant liable to the prescribed penalty, it is none the less true that, whether the relation was or was not lawfully begun, defendant was in fact the girl's employer, and she was in fact its employee, and this is sufficient to bring the case within the scope of the Compensation Act, which provides that, where not excepted by its terms, the act applies to "every employer." But ths theory ignores the fundamental fact that under the compensation statute the right of the employee to exact compensation from his employer for personal injury, according to its terms, and the right of the employer to exemption from all other liability than is there provided, are in their last analysis a matter of contract. Neither party is bound

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by the terms of the contract as to compensation until he expressly or impliedly accepts its terms. The employment of a child under the prescribed minimum age being forbidden the child cannot lawfully consent to take employment under the statute, nor can the employer by such void contract limit his liability for injury to such child to the compensation fixed by the act, to which it was incapable of giving consent. This would seem to be the necessary result, even without resort to the aid of precedent; but it has already been so held by several courts. Whether, if a child makes a claim under the compensation act, the employer could successfully plead the child's nonage in defense, we do not attempt to decide. In New Jersey, where the compensation statute is substantially like our own, it has been ruled in accordance with the views above expressed. Indeed, we see no way in which the position taken by appellant can be upheld without destroying much of the effective force of the statute, which, out of regard for the weakness and in experience of childhood, forbids its employment in certain kinds of labor, See Hetzel v. Wasson Co., 89 N. J. Law, 201, 98 Atl. 306, L. R. A. 1917D, 75; Roszek v. Bauerie, 282 Ill. 557, 118 N. E. 991; Acklin v. Kietz (Ohio) 120 N. E. 229.

[3] II. Nor can the fact, if it be a fact, that the girl falsely or mistakenly stated her age in taking the employment, serve as a defense to this action. The prohibition declared by the statute is absolute and unconditional, and one who employs a young person to perform a service thus regulated or forbidden cannot be heard to say in excuse that he was misinformed as to the employee's age, or that he was deceived by the apparent maturity of the person employed. To hold otherwise would be to open the door to wholesale violation of the statute. The adoption of such rule would be in effect to amend the statute by reading into it the word "knowingly," or other equivalent expression. So far as we have been been able to ascertain from a reading of the precedents, the overwhelming weight of authority is with the position of appellees in this question. Stetz v. Mayer Co., 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675; Purtell v. Reading, 256 Ill. 110, 99 N. E. 899, 43 L. R. A. (N. S.) 193, Ann. Cas. 1913E, 335; Tulsa C. O. Co. v. Ratley (Okl.) 157 Pac. 1056 Glucina v. Goss, 63 Wash. 401, 115 Pac. 843, 42 L. R. A. (N. S.) 624; Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389; American C. F. Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766.

This holding is in line with the familiar cases where the courts have construed laws forbidding the sale or gift of intoxicants to minors, the presence of minors in billiard rooms, and other similar prohibitions in the nature of police regulations; and it is universally held that, where the regulation is unconditional, liability for its violation does not depend upon knowledge of the fact as to the age or condition of the person, or upon proof of specific intent to do an unlawful act. Jamison v. Burton, 43 Iowa, 282; Dudley v. Sautbine, 49 Iowa, 663, 31 Am. Rep. 165; Hammond v. King, 137 Iowa, 552, 114 N. W. 1062.

III. The cases cited by appellant, to the effect that corporations are sometimes held liable for acts done or upon contracts made ultra vires, and are not applicable here. It may also be said that the authorities are quite unanimous that, where the corporate act or contract is one which the law expressly forbids, the defense of ultra vires does apply with all its force. Bank v. Church, 129 Iowa, 268, 105 N. W. 578; Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

Without further discussion of the authorities, it is to be said that the issue of law presented by this appeal turns upon the construction and effect to be given our own statutes, and in our judgment the trial court's ruling is clearly in accord with the expressed legislative intent.

The printed record does not show the entry of any judgment, but, no question having been raised as to the appealable character of the ruling

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upon the motion to strike parts of the answer, we treat that proposition as conceded for the purpose of the case.

Finding no error in the record, the ruling appealed from is affirmed.

Preston, C. J., and Gaynor and Stevens, JJ. concur.

SUPREME COURT OF IOWA.

SECHLICH et al.

v.

HARRIS-EMERY CO. (No. 32161.)*

Appeal from District Court, Polk County; Thos. J. Guthrie, Judge.

The opinion states the case. Affirmed.

Stipp, Perry, Banister & Starzinger, of Des Moines, for appellant.

Jordan & Jordan and Miller & Wallingford, all of Des Moines, for appellees.

WEAVER, J. The plaintiffs in this case are the parents of Kate Sechlich, who was fatally injured while employed by the defendant in its department store in the city of Des Moines. The petition alleges that the death of the daughter was occasioned by the defendant's negligence, the specifications of which need not be repeated, and a recovery of damages is demanded for the resulting loss of services of the deceased. The facts disclosed by the record and the defense presented to the plaintiffs' claim are identical with those we have considered and passed upon at the present term of court in Jake Sechlich, Administrator of the Estate of Kate Sechlich, v. Harris-Emery Co., 169 N. W. 325. In that case, as in this, the appeal was from the action of the trial court in striking parts of the defendant's answer, and we sustained the ruling as correct.

The decision so announced governs this case also, and the ruling below is therefore affirmed.

Preston, C. J., and Gaynor and Stevens, JJ., concur.

* Decision rendered, Nov. 16, 1918. 169 N. W. Rep. 327.

SUPREME COURT OF KANSAS.

SWADER

v.

KANSAS FLOURMILLS CO. et al. (No. 21661.)*

2. MASTER AND SERVANT—ACTION FOR COMPENSATION—PARTIES DEFENDANT—RIGHT OF DAMAGES AND COMPENSATION—ELECTION.

Section 5 of the Workmen's Compensation Act gives an injured employee a statutory action or proceeding against his employer for com-

* Decision rendered, July 6, 1918. On rehearing, Nov. 9, 1918. 176 Pac. Rep. 143. Syllabus by the Court.

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pensation, and also for damages against a wrongdoing third party causing his injuries; and where the person entitled to maintain such statutory action is not estopped by her acceptance of compensation already provided for her, nor by her participation in arbitration proceedings to determine her compensation, nor by other acts constituting ratification or acquiescence, she may prosecute her action against both the employer and the wrongdoing third party, and she is not required to choose between the compensation allowed, or which may be allowed, and the damages which she may recover, until her action is tried and determined, but she is not entitled to recover both damages and compensation.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

On Rehearing.

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"RECOVER."

In section 5 of the Workmen's Compensation Act, section 5899 of the General Statutes of 1915, where an injured workman is authorized to take proceedings against the person causing his injury and also against his employer, but providing that the workman shall not be entitled to recover both damages and compensation, the word "recover" means to "get," "procure," "obtain," and the like, and the provision concerns itself with actual payment of money as damages or compensation and is not limited to the recovery of judgments upon which nothing may be realized.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

Appeal from District Court, Dickinson County.

Action by Cora J. Swader against the Kansas Flourmills Company and R. W. Hoffman for the wrongful death of plaintiff's husband. Demurrers to plaintiff's reply sustained, and she appeals. Reversed.

Monroe, McClure & Monroe, of Topeka, for appellant.

T. A. Noftzger, of Wichita, Hurd & Hurd, of Abiline, George Gardner and Geo. W. Cox, both of Wichita, and Samuel A. Harper, of Chicago, Ill., for appellees.

DAWSON, J. The plaintiff brought this action against the defendants for the wrongful death of her husband, who was killed by a fall through a false flooring placed near the top of a tall grain bin. The deceased was an employee of the defendant company, and the other defendant Hoffman was the company's manager.

The defendant company's answer pleaded that both the rights and liabilities of itself and the decedent were those prescribed by the Workmen's Compensation Act, and that pursuant thereto an arbitration had been made, and that the defendant corporation had been found liable to plaintiff and her children in the sum of $2,297.16, payable in weekly installments of $20.15, and that a bond had been exacted from the defendant corporation to secure the payment thereof, and that in compliance therewith it had been regularly paying such weekly compensation to the clerk of the court. The defendant Hoffman's answer was to the same general effect; he denied the charge of negligence against him individually and alleged that plaintiff had refused to agree to the arbitration, but that it had been duly made and adjudicated. Plaintiff's reply admitted that the milling corporation was within the provisions of the Compensation Act, but alleged that she had never consented thereto and had not accepted the proceeds thereof, and—"that the plaintiff was not bound by the decedent's failure to file an election not to come with the provisions of the compensation law, and that the decedent was without power or authority to restrict the liability of the company to the provisions of said law and

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exclude plaintiff and her minor children from their other remedies, and that in so far as the workmen's compensation law attempted to restrict the company's liability as to the dependents of the workman, it was in violation of the state and federal Constitution."

Replying to the answer of defendant Hoffman, plaintiff alleged:

"That, even if said workmen's compensation law was the proper measure of compensation due plaintiff from the milling company, the proceedings had thereunder had never been consented to or the benefits received or any money accepted, and that as between plaintiff and defendant Hoffman, plaintiff was not bound by the provisions of said law or the remedies or measure of compensation therein provided, and so long as she had not accepted the benefits of the court's adjudication against the milling company that the proceedings had thereunder did not constitute a bar to her cause of action against the defendant Hoffman."

[1] Demurrers to the plaintiff's reply were sustained, and plaintiff appeals. Her first contention is that the title to the compensation act is not broad enough to embrace that portion of the act which treats of the remedies provided for the dependent family of a workman who meets his death in the course of his employment, and that the latter subject is independent and unrelated to the subject of compensation for injured workmen to such an extent that it could not be embraced in one act with legislation relating to compensation for injured workmen without offending section 16 of article 2 of the state Constitution, which says:

"No bill shall contain more than one subject which shall be clearly expressed in its title."

The court adheres to its decision in Shade v. Cement Co., 93 Kan. 257, 261, 144 Pac. 249, touching the sufficiency of the title to embrace the entire subject-matter of the act, and now holds that the compensation provided for the dependents of a workman who is *fatally* injured in the course of his employment is a germane and pertinent incident to the main subject, and not a different subject requiring a separate act of the Legislature. Huyett v. Pennsylvania R. R. Co., 86 N. J. Law, 683 [92 Atl. 58].

[2] Turning then to the main question, the compensation act provides that where the circumstances show a legal liability against a third person as well as against the employer, the injured workmen (and in case of fatal injury, the person acting in behalf of his dependents) may take proceedings against his employer for compensation *and* against the wrongdoing third party to recover damages, but shall not be entitled to recover both *damages* and *compensation*. Laws 1911, c. 218, § 5; Gen. Stat. 1915 § 5899.

The statute thus gives a sort of dual cause of action, for compensation and for damages, but qualifies and limits the recovery to the *one* or the *other*. The plaintiff has not accepted the compensation provided for her and her children under the arbitration proceedings, and she has done nothing to estop herself from exercising her dual action conferred by the statute. The time will probably come in the course of the present lawsuit when plaintiff must elect whether she will accept the compensation provided for her or accept the damages which she may recover against Hoffman, provided she successfully maintains her cause of action against him, but there is nothing in the statute which says or infers that she need choose between the damages and the compensation until she knows definitely which is the more to her advantage. In this respect the Kansas statute differs from some other state laws. English and Scotch decisions are cited by defendants, but upon careful examination we discern nothing therein which detracts from the views herein expressed. See, also, Columbia Law Review, June 1918, vol. 18, No. 6, p. 598.

The demurrers to plaintiff's replies to the several answers of the defendants should be overruled, and the cause should proceed in accordance with the views herein expressed.

Reversed.

All the Justices concurring.

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On Rehearing.

[3] The appellant, who prevailed in this court, directs our attention to a point urged in her brief which was not covered by our opinion (103 Kan. 378, 176 Pac. 143). She asked for an interpretation of the world "recover" in the text of section 5 of the Compensation Act, which reads:

"The workman may take proceedings against the person [causing the injury] to recover damages and against any person liable to pay compensation under this act for such compensation, but shall not be entitled to "recover' both damages and compensation." Gen. Stat. 1915 § 5899.

Apellant fears that in further proceedings in this case it may transpire that she might recover an uncollectible judgment "against the person causing the injury," and that under our original opinion she might be put to an election between a large uncollectible judgment against such person and the relatively small allowance made to her under the Compensation Act. No artificiality surrounds the word "recover" in this act. "Recover" here means "obtain," procure," "get," and the like; to get damages or compensation; not a judgment, but the benefits of a judgment; it means payment. Neither an uncollectible judgment against the wrongdoer nor an unsuccessful attempt to realize thereon would bar plaintiff's right to compensation under the act. This must be the proper interpretation, for in making a law, which it hoped to frame so simply that litigation under it would be reduced to a minimum, the Legislature would hardly concern itself about how many uncollectible judgments a person might recover under the act, but it would wisely and justly provide that the injured party would only be entitled to receive payment from the wrongdoer or from the employer, and not from both.

All the Justices concurring.

COURT OF APPEALS OF KENTUCKY.

NELSON

v.

KENTUCKY RIVER STONE & SAND CO.*

1. MASTER AND SERVANT—FINDINGS OF WORKMEN'S COMPENSATION BOARD—REVIEW.

It not being contended that any one engaged in the administration of the Workmen's Compensation Act was guilty of fraud or misconduct, findings of fact of Workmen's Compensation Board cannot be reviewed or set aside in view of Ky. St. Supp. 1918 § 4935.

(For other cases, se Master and Servant Dec. Dig. § 417 [7].)

2. MASTER AND SERVANT—LOSS OF EYE—COMPENSATION —STATUTE APPLICABLE—"LOSS OF SIGHT OF EYE."

Where employee lost not only the sight of his eye but the eye itself, his case would not fall within that part of section 18, Workmen's Compensation Act, making compensation solely for "loss of sight of eye," but within general provision awarding compensation "in all other cases of permanent partial disability."

Decision rendered, Dec. 3, 1918. 206 S. W. Rep. 473.

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(For other cases, see Master and Servant, Dec Dig § 385[11¼].)

(For other definitions, see Words and Phrases, First Series, Loss of Sight.)

Appeal from Circuit Court, Anderson County.

Proceeding for compensation under the Workmen's Compensation Act by John T. Nelson against the Kentucky River Stone & Sand Company. Award of Workmen's Compensation Board affirmed by circuit court, and Nelson appeals. Reversed and remanded, with directions.

Lillard Carter, of Lawrenceburg, and R. L. Black, of Harrodsburg, for appellant.

O'Neal & O'Neal, of Louisville, and F. R. Feland, of Lawrenceburg, for appellee.

CLAY, C. On October 4, 1916, John T. Nelson was working for the Kentucky River Stone & Sand Company as foreman of a gang of men engaged in sledging rock. As he was passing one of the men engaged in that work, a small piece of rock struck him in the eye, causing him to lose the sight thereof and necessitating the removal of the eyeball and the use of a glass eye.

The company admitted that the accident arose out of and in the course of Nelson's employment, and prior to the hearing before the Workmen's Compensation Board offered to pay him 65 per cent of his average weekly wages during 100 weeks as required by section 18 of the Workmen's Compensation Act, Acts 1916, c. 33, p. 354, now section 4899, Ky. St. Supp. 1918, which provides in part as follows:

"For injuries enumerated in the following schedule, the employee shall receive in lieu of all other compensation, except such as may be payable under sections 4 and 5 hereof, a weekly compensation equal to 65 per cent of his average weekly earnings, but not less than $5 per week nor exceeding $12 per week, for the respective periods stated thereon, to wit: * * * The total and permanent loss of the sight of an eye, 65 per cent of the average weekly wages during one hundred weeks."

Nelson declined to accept the offer of the company and insisted that he was entitled to compensation under the following provision of section 18:

"In all other cases of permanent partial disability, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employee compensation shall be determined according to the percentage of disability, taking into account, among other things, any previous disability, the nature of the physical injury or disfigurement, the occupation of the injured employee and age at the time of injury. the compensation paid therefor shall be 65 per cent of the average weekly earnings of the employee, but not less than $5 nor more than $12, multiplied by the percentage of disability caused by the injury, for such period as the board may determine, not exceeding 335 weeks nor a maximum sum of $4,000.

The findings of fact, ruling of law, and award of the Workmen's Compensation Board are as follows:

"Findings of Fact.

"(1) Plaintiff was injured by accident arising out of and in the course of his employment, and is entitled to compensation at the rate of $9.75 per week for such a period as the provisions of the Compensation Act may require.

(2) The removal of the injured eyeball was necessitated by the injury, the socket being left in good condition and the patient's ability to

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wear an artificial eye being normal, or about equal to the average in such cases.

"(3) The plaintiff's earning capacity is not shown to have been impaired by the removal of the eyeball, beyond the impairment caused by the loss of sight.

(4) The removal of an eye which has been accidentally injured sufficiently to destroy the sight is necessary, in nearly all instances, in order to save the remaining eye.

"Ruling of Law.

'(1) The substitution of an artificial eye for a blind eye does not cause an increased disfigurement which will impair the future usefulness or occupational opportunities of an employee engaged in the employment in which plaintiff was injured.

"Award.

"The plaintiff John T. Nelson, is awarded compensation against the defendant, the Kentucky River Stone & Sand Company, and its insurer, the Employers' Liability Assurance Corporation, Limited, in the sum of $9.75 per week for a period of 100 weeks. All costs of proceedings before the Workmen's Compensation Board are directed to be paid by the plaintiff, the defendant having before hearing offered to pay the amount recovered."

Within 20 days after the rendition of the award, Nelson appealed to the Anderson circuit court by filing a petition for review on following grounds:

"First. The said court acted in excess of its power.

"Second. Neither the order, decision, nor award is based on the facts of the case, nor is any one of them in conformity with the provision of the said act. The findings of fact are not such as are warranted by the proof and do not support the order, decision, or award.

"Third. The award makes no allowance for the loss of the eye itself or disfigurement, but only for the loss of the sight."

On the appeal the petitioner offered evidence to the effect that the eye was so injured that it was necessary to cut very deep in removing the eyeball, thus leaving a poor stump for the fitting of an artificial eye. For this reason the petitioner will not be able to wear an artificial eye all the time and during such period as he may wear it he will be subjected to constant pain and annoyance, and will be compelled to lose much time in cleansing the artificial eye. There was also evidence that he would be greatly disfigured by the loss of his eyeball.

On final hearing the circuit court affirmed the award, and the petitioner appeals.

Under our statute, all awards or orders of the board are conclusive and binding as to all questions of fact, and no new or additional evidence may be introduced in the circuit court except as to the fraud or misconduct of some person engaged in the administration of the act, and affecting the order, ruling, or award; but the court shall otherwise hear the cause upon the record or abstract thereof as cetified by the board, and shall dispose the cause in summary manner, its review being limited to determining whether or not: (1) The board acted without or in excess of its power. (2) The order, decision, or award was procured by fraud. (3) The order, decision, or award is not in conformity to the provisions of this act. (4) If findings of fact are in issue, whether such findings of fact support the order, decision, or award. Section 4935 Kentucky Statutes.

[1] Here it is not contended that any one engaged in the administration of the act was guilty of fraud or misconduct. That being true, its finding of fact cannot be reviewed or set aside. We shall therefore consider the case in the light of the board's finding that the petitioner's eye-

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ball was removed and he was compelled to wear a glass eye, but that neither of these things impaired his earning capacity beyond the loss of the sight of his eye, or caused a disfigurement that impaired his future usefulness or occupational oportunities. The question therefore is whether the award conforms to the statute and this depends on whether the injury falls within the specific schedule providing compensation for the loss of the sight an eye, or under the general provision applying to all other cases. In this connection, it must be borne in mind that disfigurement impairing the future usefulness or occupational opportunities of the injured employee is not a sine qua non to compensation under the general provision, since that provision applies "in all cases of permanent partial disability, including any disfigurement," etc. Hence the adverse finding of the board on this phase of the question is not controlling.

But it is argued in favor of the award that the act, in providing a particular allowance for the loss of the sight of an eye, necessarily contemplated and included all the reasonable and natural consequences of that particular injury. Manifestly, if this rule were adopted, the scheduled allowances would be extended far beyond the specific injuries for which they were intended. The state of Wisconsin has a Workmen's Compensation Act very similar to ours. In the case of Northwestern Fuel Co. v. Leipus et al., 161 Wis. 450, 152 N. W. 856, Ann. Cas. 1918A, 533, 9 N. C. C. A. 347, the Supreme Court of Wisconsin had under consideration the question whether an employee, who had suffered an impairment of the use of his arm to the extent of one-half should be compensated under the schedule providing a certain compensation for "the loss of an arm at the elbow." In denying the employee's right to compensation under that provision, the court said:

"The theory of the statute seems to be to make provision in the schedule, subd. 5, for certain specific injuries, and to leave all other injuries to be compensated for under other general provisions of the act.

"It is the opinion of the court, therefore, that the injury to Leipus does not fall within the schedule of fixed compensation designated in the statute under which it was classed by the commission, namely, 'the loss of an arm at the elbow.'

"Obviously the 'loss' of a member designated in the schedule has reference, not to the impairment of the member by the injury, but to the physical loss of it. All through the schedule there is nothing to indicate that impairment of a member was intended to be loss of a member, or that reduction of the efficiency of the member one-half would be one-half loss of the member. 'The loss of an arm at the elbow,' or 'the loss of a forearm at the lower half thereof,' does not mean the impairment of the arm, but the actual physical severance of it. The fact that the schedule so specifically fixes the precise injury for which compensation is allowed excludes the idea that the schedule, covers any other or different injury. In every instance the loss is specifically defined.

"The whole schedule is so specific that it is difficult to see how the Legislature could have intended that an injury to an arm impairing its usefulness 50 per cent., or any degree, would come within the schedule. It seems from the whole act that the purpose of the Legislature was to confine the fixed compensation named in the schedule in subdivision 5 to the specific injuries named therein."

[2] Looking at our act, we find that it provides compensation at a certain rate for "the loss of a thumb," the "loss of a first finger," the "loss of a hand," the "loss of an arm," the "loss of a foot," the "loss of a leg," etc., thus showing that the compensation therein provided for was confined to the loss of the particular member named. When it deals with the eye, however, it does not provide for compensation for the loss of the eye itself, but solely for the "loss of the sight of an eye." If it be true, and there is no reason to doubt the soundness of the rule, that the purpose of the Legislature was to confine the fixed compensation provided

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for specific injuries to those injuries and no others, and that the compensation allowed for a specific injury was not payable for a less injury, the rule should work both ways, and the compensation provided for a particular injury should not be held to include a greater injury. Here, the employee lost, not only the sight of his eye, but the eye itself. His injury therefore was greater than the mere loss of the sight of the eye. That being true, his case does not fall within the schedule making compensation solely for the loss of the sight of an eye, but falls within the general provision, supra, awarding compensation "in all other cases of permanent partial disability," etc.

Wherefore, the judgment affirming the award is reversed, and the cause is remanded, with directions to set aside the award and remand the case to the Workmen's Compensation Board for proceedings consistent with this opinion.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRISTOL.

DUART

v.

SIMMONS.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INCLUSION OF EMPLOYEE ON VESSEL.

Terms of Workmen's Compensation Act, are broad enough to include employee working in connection with discharge of cargo of vessel engaged in interstate or foreign commerce; only master and seamen of vessels so engaged being excluded by St. 1913, c. 568.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTIVE CHARACTER.

Under Massachusetts Workmen's Compensation Act, it is elective both with employee and with employer whether they shall become subject to its terms.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION BY EMPLOYER—EMPLOYEES OF SUBCONTRACTOR.

Employer, who chooses to become subscriber under Massachusetts Workmen's Compensation Act, is liable to employees of his subcontractor situated, with reference to the work, on the employer's promises, and subject to the peculiar conditions, thereof, having elected so to become liable.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SUBCONTRACTOR'S EMPLOYEE—FAILURE TO GIVE NOTICE.

Under Workmen's Compensation Act, pt. 1, § 5, subcontractor's employee, by failing to give notice to chief employer, on whose vessel he

* Decision rendered, Nov. 27, 1918. 121 N. E. Rep. 10.

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was to work, that he claimed his right of action at common law for any injuries, decided to become bound by act, and to waive common-law right.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

6. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—"COMPENSATION."

"Compensation," in connection in which used in Workmen' Compensation Act, means money relief afforded according to scale established and for persons designated, and not compensatory damages recoverable in action at law for wrong done or contract broken.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

(For other definitions, see Words and Phrases, First and Second Series, Compensation.)

7. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY.

Workmen's Compensation Act, as amended, is constitutional in its general aspects under both state and federal Constitutions.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

8. ADMIRALTY—WORKMEN'S COMPENSATION ACT—INJURIES OF MARITIME ORIGIN.

Workmen's Compensation Act, as amended, though of optional character, does not apply to injuries received in course of employment to discharge cargo of coal from vessel engaged in interstate commerce and lying in navigable waters; maritime and admiralty jurisdiction being in federal courts under Const. U. S. art. 3, § 2, and Judicial Code U. S. § 256, cl. 3.

(For other cases, see Admiralty, Dec. Dig. § 20.)

Exceptions from Superior Court, Bristol County; Hugo A. Dubuque, Judge.

Action of tort, for personal injuries in unloading coal from a vessel, by Joe Duart against La Forrest L. Simmons. There was verdict for plaintiff, and defendant excepts. Exceptions overruled.

D. R. Radovsky, of Fall River, for plaintiff.
White & White, of Taunton, for defendant.

The instructions as to defendant employer's responsibility for the rope whose breaking caused the injuries sued for, which instructions are referred to in the last paragraph of the opinion, were as follows:

Now, as to the manner of doing the work. You have had that explained to you by several witnesses. Something has been said about not preserving the ends of the rope where it broke, and not producing Costello, who was the man that guided the rope. It was announced this morning by the defendant's counsel that Mr. Costello had not been called; that he was an old man, and that he could add nothing to what had already been said. It is argued on the other hand on the part of the plaintiff that if Costello knew anything that was favorable to the defendant he would have been called here, and not being called you have a right to draw the inference that what he knew would not be favorable to the defendant's side. Well it is for you to say as to what inference should be drawn about that. As to keeping the ends of the rope, Mr. Simmons testified that the ends that parted were cut off, I think he said about an inch, and that he did not think of saving it. Whether it would have thrown any light upon the parting of the rope or not the evidence does not tend to show. I do not know as any explanation has been given as to the course of the parting of the rope by anybody. At any rate the parting of the

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rope tends to show that it was not strong enough for doing the work that it was called upon to do evidently at that time.

Now, whether it was something that the defendant could guard against by the exercise of proper care is a question of fact. It is claimed by the plaintiff that he put in charge the man Pond, who was an incompetent man, knew nothing about ropes or cables, and knew very little about his work. He might be a very good man to deliver coal from a coal team from the coal yard to various parts of Somerset and elsewhere, but he was not a man who was competent to do the work. Well, that is a question of fact for you to determine upon the evidence. You have seen him on the stand, he has testified and told you what he knew, and told you what he did not know, and it is for you to say as to whether that man was the proper kind of a man to leave in charge. Mr. Simmons says that he went there every day and looked over the apparatus. How much time he spent he told you, I think from one to five minutes or more; that he looked around to see that the cable was all right, that everything was all right. Whether he went over the rope inch by inch it is for you to say upon the evidence. What care did he use? He was required by law to use reasonable care, and reasonable care is the care that a reasonably prudent man, not the most prudent man, the care that a reasonably prudent man would use under similar and like circumstances.

If the defendant in the exercise of the care of a reasonable man, the average reasonably prudent man, should have seen that chafing would result from the work, and that chafing would reduce the strength of the rope, and he did not use that care, then he may be found to be guilty of negligence. In other words, if the cause of the parting of the rope, the breaking of the rope, was due to any carelessness either in selecting the rope, or in not inspecting it, or in the negligent manner in which the operation was made, then the defendant was negligent. I do not mean to intimate that there was any negligent manner in operation, but it is a question of fact for you.

RUGG, C. J. [1] The plaintiff received injuries in the course of his employment by one Davis, who by independent contract furnished the plaintiff and two other laborers to the defendant for work in shoveling coal in the hold of a schooner tied up at the defendant's wharf. The contract of Davis as independent contractor was for the performance of a part of the business carried on by the defendant on his own premises. The defendant was a subscriber under the Workmen's Compensation Act, St. 1911, c. 751. The plaintiff's employer, Davis, was not a subscriber under that act. It is urged that the plaintiff is confined to the remedies afforded by the act. Its terms are broad enough to include an employee such as was the plaintiff, working in connection with the discharge of the cargo of a vessel engaged in interstate or foreign commerce. In this connection only "masters on and seamen on vessels engaged in interstate and foreign commerce" are excluded expressly from the operation of our act by its terms. St. 1913, c. 568; Morrison v. Commercial Tow Boat Co., 227 Mass. 237, 116 N. E. 499.

[2-5] The accident occurred in the course of the employment of the plaintiff in the discharge of a cargo of coal from a vessel engaged in interstate commerce while she was lying in navigable waters. His work and his injury were maritime in their nature. S. 52, 59, 60, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; Clyde S. S. Co. v. Atlantic Transport Co. v. Imbrovek, 234 U. Walker, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116. By article 3, § 2, of the Constitution of the United States, the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction." The judicial Code of the United States (Act of March 3, 1911, c. 231, 36 U. S. Stats. at Large, 1087), by section 256, cl. 3, vests exclusive jurisdiction in the federal courts "of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases,

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the right of a common-law remedy, where the common law is competent to give it." It was decided in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451 Ann. Cas. 1917E, 900, that the compulsory Workmen's Compensation Act of New York (Consol. Laws, c. 67) was unconstitutional so far as its terms applied to martime injuries. It is earnestly argued that the case at bar is distinguishable from the Jensen Case. The grounds urged are that our act is permissive and not mandatory, as was the New York law. Under our act it is elective both with the employee and likewise with the employer whether they shall become subject to its terms. An employer, who chooses to become a subscriber under our act, is liable to the employees of his subcontractor situated with reference to his work as was the plaintiff. He has elected so to become liable. The plaintiff as employee of the subcontractor, by failing to give notice to the employer as required by part 1, § 5, of the act, has decided to become bound by the act and to waive his common-law right. White v. George A. Fuller Co., 226 Mass 1, 114 N. E. 829; Young v. Duncan, 218 Mass. 346, 106 N. E. 1. These are the cogent arguments put forward in behalf of the defendant.

[6] The Workmen's Compensation Act (except in part 1) is not an amendment to the common law, but the establishment of heretofore unknown obligations, compensations and methods of procedure, all differing from and in place of those afforded by the common law. The general purpose of the act was to substitute, in cases to which it is applicable, for common-law or statutory rights of action and grounds of liability, a system of money payments based upon the loss of wages by way of relief for workers receiving injury in the course of and arising out of their employment. As stated in the "Report of the Commission on Compensation for Industrial Accidents" submitted in 1912, which framed the act adopted by the Legislature (without change except in part 5, § 3, whereby all liability insurance companies were granted the same privileges as the Massachusetts Employees' Association in the matter of insuring), at page 46:

"The Massachusetts Law may be briefly characterized as an elective compensation insurance law giving compensation for all injuries araising out of employment irespective of negligence except those due to the serious and willful misconduct of the injured employee. The basic principle of the act is that the cost of the injuries incidental to modern industry should be treated as a part of the cost of production. The act was framed with that end in view.

The payments provided by the act are founded simply upon such injury and are entirely disconnected with any theory of fault on the part of the employer or right on the part of the employee established by law prior to the passage of the act save in instances of "serious and willful misconduct." With this single exception, considerations of fault, negligence, tort or due care are excluded from proceedings under the act. The amounts of such payments bear relation to the amount of wages received by the employee, are to be determined speedily and are to be paid commencing forthwith, and ordinarily are to be continued in small installments regularly during a given period with the privilege of commutation by a single payment under certain restrictions. All payments are by way of financial relief for inability to earn wages, or for deprivation of support flowing from wages theretofore received. The word "compensation" in the connection in which it is used in the act, means the money relief afforded according to the scale established and for the persons designated by the act, and not the compensatory damages recoverable in an action at law for a wrong done or contract broken.

[7, 8] The ground of the Jensen decision as we understand it is that the kind of legislation represented by Workmen's Compensation Acts is

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beyond the jurisdiction of the states so far as it relates to admiralty and maritime affairs. The reasoning of that decision seems to us to apply equally to an elective as to a compuslory Workmen's Compensation Act. Consent of parties cannot confer jurisdiction. A statute which in its nature is outside the jurisdiction of the state, because within the exclusive domain of the federal government, cannot confer rights or be a bar to the enforcement of common-law obligations. This question never before has been raised as to our act, and in several instances without discussion its provisions have been enforced as to maritime injuries. Brightman's Case, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; McManaman's Case, 224 Mass. 554, 113 N. E. 287. See Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371. These cases arose, however, before the decision of the Jensen Case. Although our act is constitutional in its general aspects, both under state and federal Constitution (Young v Duncan, 218 Mass. 346, 106 N. E. 1; Hawkins v Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637), we feel constrained by the controlling authority of the Jensen Case to hold that it does not apply to injuries having maritime origin. A similar conclusion has been reached for the same reason by the Supreme Court of Wisconsin with regard to the Workmen's Compensation Law of that state, which in respect of being optional and not compulsory resembles our own act. Neff v. Industrial Commissinn, 166 Wis. 126, 164 N. W. 845. Seemingly the exclusive nature of the federal jurisdiction has been released as to cases of this sort occurring since October 6, 1917, by U. S. Stats. at Large, c. 97, § 2 (40 Stat. 395), approved on that date, amending the Judicial Code of the United States. § 256 (Act of March 3, 1911, c. 231, 36 U. S. Stats. at Large, 1087, 1169 [U. S. Comp. St. 1916, § 1233]). It follows in our opinion that, by reason of the decision in the Jensen Case, the plaintiff's rights and the defendant's obligations must be determined according to the common law.

[9] There was evidence of the plaintiff's due care. Whether he moved with adequate alacrity away from under the hatch and with sufficient vigilance for his own safety watched the tub of coal were questions of fact to be decided in the light of his explicit testimony and the fall of the tub of coal and his consequent injury.

[10] The defendant, in view of the evidence, hardly can contend that the plaintiff was a servant of the defendant and that hence the fellow servant defense will avail. The plaintiff was employed by Davis, who contracted with the defendant to unload the coal from the schooner at a given price per ton. Although all the other men at work in connection with the discharge of the cargo, except the plaintiff and his two companions, who shoveled the coal into the tubs in the hold of the schooner, were employed by the defendant, and all the appliances were furnished by him, the plaintiff does not appear to have been working under the direcion of the defendant or his servants. The plaintiff therefore can recover for injuries sustained by him through the negligence of the servants of the defendant while acting within the scope of their employment. Hooe v. Boston & Northern Street Railway Co., 187 Mass. 67, 72 N. E. 341. McLellan v. Boston & Maine Railroad, 212 Mass. 153, 98 N. E. 595.

[11-13] The defendant was not responsible for the conduct of the servants of Davis, the independent contractor. If the plaintiff's injuries resulted from their negligence, he cannot recover from the defendant. The trial does not appear to have proceeded on the theory that the plaintiff sustained injury from the negligence of his fellow employees. A careful perusal of the record fails to disclose any conduct on their part contributing to the injury of the plaintiff. The jury were instructed with adequate amplification that the plaintiff would be entitled to a verdict only by showing that his injury was the consequence of the negligence of the defendant or of those employed by him. Upon this state of the evidence, that was enough. It was unnecessary to state further that the

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plaintiff could not recover if injured through the negligence of a fellow servant. A request for instruction to the jury respecting a sound principle of law not applicable to the evidence is denied rightly.

[14] There was no error in denying the requests to the effect that the defendant was not responsible if the rope (whose parting permitted the fall of the tub upon the plaintiff) was purchased from a reputable maker and gave way because of a hidden flaw after using a few times. On the defendant's own testimony, he had owned the rope for about six months and had used it for unloading one cargo of coal before the one on whch it was being used at the time of the accident. The instructions given upon this point cannot be pronounced insufficient under all the circumstances.

Exceptions overruled.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK

McCARTHY'S CASE.*

1. MASTER AND SERVANT—WORKMAN'S COMPENSATION ACT—DECISIONS OF ACCIDENT BOARD—REVIEW.

Decisions of Industrial Accident Board on questions of fact stand on same footing as verdict of jury or finding of judge, and are not subject to review, except to determine whether there is any evidence to support them.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WEIGHT AND CREDIBILITY OF TESTIMONY—INDUSTRIAL ACCIDENT BOARD.

Weight and credibility of testimony as to any causal connection between injury to decedent and tuberculosis which resulted fatally to him is for the Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMAN'S COMPENSATION ACT—CAUSAL CONNECTION BETWEEN INJURY AND DEATH—SUFFICIENCY OF EVIDENCE.

In widow's proceedings for compensation for death of her husband, evidence there was no causal connection between injury and tuberculosis from which decedent died *held* to support decision of Accident Board in favor of insurer.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Superior Court, Suffolk County; John D. McLaughlin, Judge.

Proceedings under the Workmen's Compensation Act (St. 1911, c. 751, amended by St. 1912, c. 571), by Ellen McCarthy, to recover compensation for the death of her husband, Dennis McCarthy, the employee,

* Decision rendered, Nov. 23, 1918. 120 N. E. Rep. 852.

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on the ground that it was caused by personal injury received by him, that his condition of tuberculosis was accelerated by the injury, and that the weight of the medical evidence was decisive, that the disease and the injury had a direct connection. The proceeding was opposed by the Massachusetts Employees' Insurance Association, and from a decree of the superior court sustaining the finding of the Industrial Accident Board that the accident had no causal connection with the death, the widow appeals. Affirmed.

Bernard J. Killion, of Salem, and Charles Toye, of Boston, for appellant.

John W. Cronin and Frederick A. Carroll, both of Boston, for appellee.

PER CURIAM. [1-3] It has been decided repeatedly that the decisions of the Industrial Accident Board upon questions of fact stand upon the same footing as the verdict of a jury or the finding of a judge and are not subject to review. The only question in that connection is whether there is any evidence to support the decision. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Moran's Case, 230 Mass. 500, 119 N. E. 956; Knight's Case, 231 Mass. 142, 120 N. E. 395. The crucial question in the case at bar was whether any causal connection was shown between the disease known as acute miliary tuberculosis, which resulted fatally to the employee on February 2, 1915, and the abrasions on his leg and foot, received in the course of and arising out of his employment on the 14th of the preceding September. The record shows that while there was some testimony tending to show that there was such connection, there was other testimony tending to show that there was no such connection. Its weight and credibility were for the Industrial Accident Board. The decision of the board in favor of the insurer has ample support in the evidence and cannot be set aside.

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

MELLON'S CASE.*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—EXPENSES—APPOINTMENT OF LEGAL REPRESENTATIVE.

Fact that compensation insurer would not pay deceased employee's beneficiaries in Scotland and insisted on appointment of administrator, was not inconsistent with existence of some estate to be administered on death of employee, and so not sufficient to bring appointment of administrator within Workmen Compensation Act, pt. 2, § 13, as amended by St. 1914, c. 708, § 7, as to expenses of appointment of a "not otherwise necessary" legal representative.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

* Decision rendered, Nov. 29, 1918. 121 N. E. Rep. 18.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LEGAL REPRESENTATIVE OF DECEASED EMPLOYEE—COMPENSATION BY INSURER.

Duty placed upon insurer by Workmen's Compensation Act, pt. 2, § 13, as amended by St. 1914, c. 708, § 7, to pay for legal services in connection with appointment or duties of legal representative of deceased employee not otherwise necessary, is limited to necessary disbursements for appointment, representative's necessary expenses, and compensation for time necessarily spent in carrying out provision that, if payment is made to him, it shall be paid to dependents.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Appeal from Superior Court, Suffolk County.

Claim under the Workmen's Compensation Act by Michael Ruane, administrator of the estate of John Mellon, deceased employee of Fred L. Jordan, for compensation for legal services, opposed by the Massachusetts Bonding & Insurance Company, insurer. From a decree refusing compensation, claimant appeals. Affirmed.

Fred W. Mansfield, of Boston, for appellant.

Jos. A. Dennison and Robt. Gallagher, both of Boston, for insurer.

PIERCE, J. This is an appeal from the decree of the Industrial Accident Board refusing to allow to the appellant compensation for legal services, alleged to have been rendered in opposing the petition of the insurer to that board to re-open the John Mellon case, "because of the agreement of compensation was signed by mistake" and in opposition to a petition of the insurer to vacate a decree of the superior court entered upon the filing of the agreement therein. St. 1911, c. 751, part 3, § 11, as amended by St. 1912, c. 571, § 14.

The appellant was appointed administrator upon the estate of John Mellon, the employee, deceased. The beneficiaries entitled to compensation lived in Scotland. The insurer agreed to and insisted upon the appointment of an administrator. The record does not disclose the next of kin or whether or not the deceased left estate to be administered. The appellant has been paid for legal services connected with his appointment and for his services as administrator. The questions presented are, whether the appointment of the administrator is shown by the record to have been "not otherwise necessary," and whether, if it appears to have been "not otherwise necessary," the insurer under part 2, § 13, of St. 1911, c. 751, as amended by St. 1914, c. 703, § 8, is liable for professional services rendered to the administrator in addition to the necessary disbursements and expenses of the administrator with reasonable compensation for his time necessarily spent in carrying out the provisions of this act.

Section 13, above referred to, reads as follows:

"The compensation payable under this act in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative to his dependents; or, if he leaves no dependents, to the persons to whom payment of the expenses for the last sickness and burial are due. If the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act. When the appointment of a legal representative of a deceased employee, not otherwise necessary for carrying out the provisions of this act, the association shall furnish or pay for all legal services rendered in connection with the appointment of such legal representative, or in connection with any of his duties, and shall pay the necessary disbursements for such appointment, the necessary expenses of such legal representative, and reasonable compensation to him

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for time necessarily spent in carrying out said provisions. All of said payments shall be in addition to all sums paid for compensation."

[1] There is nothing in the statements that the insurer would not pay money to the beneficiaries in Scotland, and that the insurer insisted in getting an administrator appointed, inconsistent with the existence of an estate of greater or less value which remained to be administered upon the death of the employee. This is all the record discloses, and manifestly is not sufficient to bring the appointment of the appellant administrator within the terms of the above act. If a legal representative was appointed to administer property left by the deceased employee, the insurer would not be held to reimburse that person for money paid for legal services rendered him in the recovery of the compensation which, under the statute is to be paid by him to dependents or other persons entitled thereto.

[2] We are of opinion section 13, supra does, not place such a burden upon the insurer in case a legal representative not otherwise necessary to be appointed is appointed to receive and distribute the compensation in accordance with "the provisions of this act," and that the duty placed upon the insurer by the terms of the statute is limited to the "necessary disbursements for such appointment, the necessary expenses of such legal representative, and reasonable compensation to him for time necessarily spent in carrying out" the provisions of the statute that, "if the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act."

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

DOW'S CASE.

In re AMERICAN MUT. LIABILITY INS. CO.*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—BURDEN OF PROOF.

Burden was on deceased employees' dependents to prove alleged injury to employee was sustained while he was alive, and that death resulted therefrom, and that injury arose out of and in course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—EFFECT OF EXPERT TESTIMONY.

Member of Industrial Board hearing workmen's compensation case, and the full board, were not bound to accept conclusions of medical witnesses as to whether employee was dead when he fell on a machine, or whether living, so that machine caused his death.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

* Decision rendered, Nov. 29, 1918. 121 N. E. Rep. 19.

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3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain finding of Industrial Board that deceased employee was alive when he fell upon machine, so that machine caused his death.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—PROXIMATE CAUSE OF DEATH.

Employee's fall upon machine was proximate cause of death, cause of fall being remote cause only, since fall itself placed employee's body in such relation with machine that neck was torn open and carotid artery severed.

(For other cases, see Master and Servant, Dec. Dig. § 374.)

5. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—"OUT OF AND IN COURSE OF EMPLOYMENT."

Where beam tender of tire fabric company, whose business it was to see that yarn was wound around revolving cylinder, was killed when he fell on machine, so that his neck was torn open and carotid artery cut, injury arose "out of and in the course of employment," within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571), by Lillian Dow, dependent mother of John Dow, employee, for compensation for his death, opposed by the American Tire Fabric Company, the employer, and American Mutual Liability Insurance Company, the insurer. Compensation was awarded, the award affirmed by the superior court, and from its decree the insurer appeals. Decree affirmed.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason and E. C. Stone, both of Boston, of counsel), for appellant.

Oscar H. Nelson and Horace I. Bartlett, both of Newburyport, for appellee.

PIERCE, J. The deceased employee was a beamer tender in the employ of the American Tire Fabric Company. As such, it was his business to see that yarn was wound around a revolving beam, or cylinder, which had a beam-head with a flat surface and an edge about five-eights of an inch wide. Back of the beam upon which the yarn is wound is a roll four or five inches in diameter, which presses against the beam; and there is a long leverage which goes to the ceiling and there gives compressed leverage: Because of the pressure roll the beamer tender is never supposed to pass his hand across the yarn to see if it is running smoothly: If anything was wrong with the machine it was the duty of the employee "to put his foot on the treadle and stop the machine."

A few minutes before the accident the deceased, apparently all right, talked to his foreman in front of his machine. No one saw the accident. The machine was stopped almost immediately after the accident. The deceased was found with his left arm in the machine and his right arm outside the beam. "His left hand and arm were caught in and his right arm was lying outside "toward the large cam the other side of the

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cogwheel.'" "The carotids and jugular vein were severed. * * * The windpipe was severed and all the muscles were 'pretty well torn.'" When the machine was reversed and the body removed, life was extinct. There was blood two or three feet away from the beamer "as if it was all one spurt," and a little blood on the machine. The body was embalmed, not by the usual process, but the fluid was put into the abdominal cavity which fluid more than offset the weight of blood lost. Two weeks after the death of the employee an autopsy was made. The physician who performed the autopsy testified;

"That the right lung was practically atrophied but there was function. The left lung nearly normal. The valves of the heart were shrunken. There was evidence of vegetations of the mitral valve. He did not make a miscroscopic examination of the lungs. He further testified that the diseased lung was one of the worst lungs he had ever seen. The left lung was the one that performed the function of the lungs, and from his examination he would have looked for endocarditis or myocarditis or possibly both. There was and has been endocarditis and that would involve the valves of the heart. Endocarditis would be an affliction of tuberculosis of the lungs, particularly in its late state. The vegetations found might cause aortis regurgitation. He further testified that a subject such as this, in the last stages of tuberculosis, would be toxic and stated that there would not be sufficient aspects in the lungs to give him the necessary oxygens to keep up an illuminative process. Dow, in his opinion, was dying on his feet and he did not and could not reason out how he could hold down a working position. It was his opinion that Dow's heart was weak and that further he was poorly nourished. In answer to the question 'whether from his autopsy he could say Dow was dead by the time he struck the machine,' the doctor testified that if there had been no injury as a result of the fall on the machine and Dow had been attacked, he would have expected at the time he performed the autopsy that the man was in the last stages of tuberculosis with a consequent affection of the heart and that he dropped dead, but having his throat cut there was a chance that he had a collapse as a result of his condition and fell and got his neck cut."

[1-3] Manifestly the burden of proof was upon the dependents to prove that the alleged injury to, and death of, the employee was sustained and resulted while the employee was alive, and that it arose out of and in the course of his employment. If believed upon the uncontradicted testimony of the two and only expert witnesses to the effect that, whether the boy was dead when he struck the machine or whether he was living and the machine caused his death, it is as reasonable to say one thing as another; and that whether or not he was dead at the time he struck the machine would be absolutely impossible for any doctor to say definitely, the member and the Industrial Accident Board warrantedly could have found that the solution of the question remained one of pure conjecture. But the member and the board were not bound to believe or to accept the conclusions of these witnesses; and they had the right, based upon reasonable inferences drawn from the facts established by the evidence before them, to find as they did that the employee was not dead when he fell upon the machine, but was living and the machine caused his death. The member and the board based that finding principally upon the fact that the evidence showing that there was a spurting of blood as far as three feet from the gash in the throat indicated the strength of the heart as alive and forceful at the time. Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641. See Sanderson's Case, 224 Mass. 558, 113 N. E. 355. We cannot say as matter of law the conclusion of the member and board was unsupported by the evidence.

[4] The insurer next contends that—

"If the employee was alive when he struck the machine, the cause of

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his fall was the proximate cause of death, and that cause is unknown and conjectural."

It is quite plain the cause of the fall was the remote cause, and that the fall itself was the dominant and proximate cause which placed the body of the employee in such relation to revolving parts of the machine that the edge of the beam-head pressed against the neck of that person in such manner as to sever the carotids, tear out the neck and cause death. Bohaker v. Travelers' Ins. Co., 215 Mass. 32, 35, 102 N. E. 342, 46 L. R.A. (N. S.) 543, and cases cited.

[5] The insurer finally contends that the fall did not arise out of the employment. Indisputably the injury occurred during the course of the employment, and the fall into the machine was from the front of the machine where the employee was standing in the active performance of his duty.

The real question is not so much the cause of the fall or whether the fall as such arose out the employment, but whether the risk and harm of a fall into or upon machinery then in use by an employee are incidents of that business and hazards to which the workman would have been exposed apart from that business. McNichol's Case, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306; Wicks v. Dowell, [1905] 2 K. B. 225. We think the injury arose out of and in the course of the employment. Brightman's Case, 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A, 321; Mooradjian's Case, 229 Mass. 521, 118 N. E. 951; Hallett's Case, 230 Mass. 326, 328, 119 N. E. 673.

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

WEATHERBEE'S CASE.

In re MASSACHUSETTS BONDING & INS. CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF ACCIDENT BOARD—FINALITY.

Findings of Industrial Accident Board on all questions of fact, under Workmen's Compensation Act, pt. 3, § 11, as amended by St. 1912, c. 571, § 14, are final, and cannot be set aside, if there is any evidence to support them.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY IN COURSE OF EMPLOYMENT—QUESTIONS OF FACT.

Whether deceased servant received injury which caused his death, and whether injury arose out of and in course of employment, were questions of fact for Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

* Decision rendered, Nov. 27, 1918. 120 N. E. Rep. 845.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING AS TO CAUSE OF DEATH—CONFLICTING EVIDENCE.

Where, on question whether deceased servant's death was caused by strain of swinging heavy sledgehammer, thereby injuring and weakening an already diseased heart, or was matter of speculation and conjecture, evidence was conflicting, finding of Industrial Accident Board must stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act by Bertha H. Weatherbee for compensation for the death of her husband, Amos Weatherbee, the employee, opposed by the Town of North Attleboro, the employer, and the Massachusetts Bonding & Insurance Company, the insurer. Claim for compensation was dismissed, denial affirmed by the superior court, and from its decree the claimant widow appeals. Decree affirmed.

The medical testimony as to the cause of death was as follows:

Dr. Willis L. Hale testified that he is a practicing physician, having practiced in Attleboro for 16 years. He was called to the Smith street crusher in North Attleboro on August 5, 1916, to attend Amos Weatherbee. He found him dead, lying flat on his back amongst some stones, and there was a hammer by his side. The men told him that there was no struggle, but that he collapsed. He was pretty well blanched out, completely relaxed and still warm. There were no bruises on his head, arms or legs. He examined his eyes and found them dilated. Upon examining the wrist for his pulse, he found the arteries were hard, or sclerotic. He decided then that Mr. Weatherbee had died of acute heart failure. After listening to the testimony this morning, from what the men told him at the crusher at the time of his death, and from his examination, he should say that Amos Weatherbee had died of acute dilatation of the heart, evidently from exertion. He should say that the arteries were sclerotic; they had probably weakened the heart, and that exertion of swinging a heavy sledgehammer might have caused acute dilation or heart failure. He has heard no evidence this morning at the hearing of any other cause for death in this case; the conditions did not show apoplexy or anything of that sort, and he probably would have lived if he had not swung the hammer.

Under cross-examination, Dr. Hale testified that he had never specialized in diseases of the heart. The conditioning of hardening of arteries in the wrist that he found in Mr. Weatherbee would be apt to indicate that the other arteries in the body were hard. He doubts if any one could tell absolutely whether Mr. Weatherbee died of acute dilatation of the heart or coronary sclerosis without a post mortem examination. But he does not think this man would have died so suddenly with coronary sclerosis; he would expect a history of trouble in such a case. he bases his opinion that Mr. Weatherbee died of acute dilatation of the heart because he collapsed when standing upright. The fact that Mr. Weatherbee was accustomed to lifting the sledgehammer does not alter his opinion that it was an extreme exertion at that time. If his condition was such as the doctor thinks it was, that is, one of general sclerosis of the arteries and enlarged heart, he was liable to drop dead any time he made the extra exertion. Enlarged heart usually accompanies hardening of the arteries.

Dr. Daniel J. Kiley testified that he was graduated from Tufts Medical School; he then went to St. Joseph's Hospital in Providence, and to the De Pau Hospital in South Carolina. He has been in general

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practice in North Attleboro for three years, and he also does surgical work. He never saw Amos Weatherbee during his life, and did not see his remains. When a sclerotic condition exists it requires an increase of pressure to force the blood through the arteries, and that requires over-development of the heart muscle. Then the time comes when the development has reached its maximum, the elasticity of the heart muscle has been expanded, and the musculature has outlived its life; retrogressive change takes place in the heart muscles, and it starts to weaken thereafter. He should say, from the evidence, that in Amos Weatherbee's case the heart was slerotic; that it had reached the state of development where there was no further strength left to the heart muscles; myocarditis had taken place, due to the impoverished blood supply, and when he exerted the force necessary to lift the heavy sledgehammer, the blood pressure was increased, and that pressure on the heart muscle, through the blood supply, caused spasm; the heart failed to respond with enough energy to send the blood back, and it gave way under the strain. On the history of the case as he heard it to day at the hearing, he does not see any other efficient cause of the death of Amos Weatherbee from acute dilatation of the heart than the extreme exertion required to swing the sledgehammer a number of times.

Under cross-examination, Dr. Kiley testified that he has not specialized in diseases of the heart; but he has treated people with heart lesions and hardening of the arteries. The fact that Amos Weatherbee had used the sledgehammer during a period of seven or eight years does not change the doctor's opinion that it was extreme exertion at that time. The doctor excludes cerebral hemorrhage as a cause of death in this case, because sudden deaths from cerebral hemorrhage are very uncommon. If the cerebral hemorrhage occurs at the nerve of respiration at the base of the brain, death would be sudden; but it usually occurs in the motor area, which controls the muscles, and in this case it is not likely to result in sudden death. A person might be ill with acute dilatation of the heart for two or three months and then recover, but this only occurs in the young; he has never heard of or seen any such case in people of middle age; with them it is usually sudden. Deaths from myocarditis may or may not be sudden. In the past two years he has attended two cases of myocarditis resulting in sudden death, one of them a month ago. In this latter case he remembers that the patient's appearance after death was a state of collapse, the pupils were dilated and the face was blanched. People frequently die in bed from myocarditis. Death from angina pectoris in bed is not frequent.

Dr. Melvin Seymour testified that he was graduated from the Harvard Medical School, was house officer at the City Hospital, and is now connected with the Massachusetts General Hospital. He has specialized on the subject of internal medicine and has written on the subject. Having listened to the testimony at the hearing to-day, he should say that Amos Weatherbee's death might have been the result of any one of the following causes; acute dilatation of the heart, an acute attack of angina pectoris, cerebral hemorrhage, or accute uremia. He could not state to which one of these possible causes the death was due. He could not rule out angina pectoris, or coronary sclerosis, because it may or may not result in sudden death. The person so afflicted may collapse suddenly after one severe pain, or he may have intermittent pains extending over a longer period. He has known of cases of sudden death from coronary sclerosis where unusual stress has been put upon the heart, such as the raising of heavy loads, etc. From the history of this case, however, he should say that Amos Weatherbee was not doing anything unusual, but that he was engaged in the work to which he was accustomed. Death may or may not be sudden from acute dilatation of the heart; it is not a rule that it is always sudden. It is possible for a person to have it for months; and this lingering condition is not true of the young alone. Cerebral hemorrhage

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may cause instant death, like apoplexy, or the patient may linger. This man might have died as readily from acute uremia after eating heavily as from swinging a hammer.

Under cross-examination, Dr. Seymour testified that it is true that there is an age limit to a man's endurance, to the amount of heavy work that he can do. He would not care to say that Amos Weatherbee's death was not caused by acute dilatation brought about by swinging the heavy sledgehammer, and he could not state that it was.

Dr. Cadis Phipps testified that he was graduated from the Harvard Medical School; then went to the City Hospital, South Department; he was on the staff of the City Hospital for six or seven years; he is assistant professor of medicine at Tufts Medical School. He has specialized in the subject of internal medicine and has written on the subject. After listening to the testimony this morning, he could not state the cause of Mr. Weatherbee's death. He mentioned four possible causes for the death as follows: Sclerosis of the coronary arteries; cerebral hemorrhage, commonly calley apoplexy; acute uremia; acute dilatation of the heart. He has heard nothing in the testimony that would cause him to rule out any one of these causes. Acute uremia results in instant death. Cerebral hemorrhage might result in sudden death. Acute dilatation of the heart can result in instantaneous death, but it is not the typical thing; he would expect previous symptoms. Coronary sclerosis is a more common cause of sudden death than dilatation. From the testimony he has heard nothing in the case that removes the cause of death from the field of conjecture.

Under cross-examination, Dr. Phipps testified that in acute dilatation of the heart as a cause of death he would expect a previous history; in uremia there might or might not be previous symptoms; in cerebral hemorrhage there probably would not be previous symptoms. In coronary sclerosis there might or might not be previous symptoms, but in most of the cases of death from coronary sclerosis that he has seen there has not been a previous history. If the exertion of swinging a heavy sledgehammer were going to have an effect in any one of the four possible causes of the sudden death in this case, he should think it would most probably have an effect in acute dilatation of the heart. The absence of a previous history of heart ailment in this case, however, would tend to indicate the improbability of acute dilatation. He could not say that swinging the hammer caused or hastened his death by any one of these four possible causes. He does not know whether the exertion of swinging a sledgehammer would accelerate sclerosis; it might have an effect in sudden death by cerebral hemorrhage; he does not know whether such an exertion would have an effect in acute uremia; but unusual strain is recognized as having an effect in acute dilatation of the heart. He would not form an opinion that swinging the sledgehammer could be regarded as an "extra exertion," and as such a factor in the death of Amos Weatherbee, because, from the history of the case, it seemed to him that he was engaged in his accustomed work. The manner in which "extra exertion" would play a part would be as an unaccustomed or unusual strain, or exertion. Of course, there is a limit to the age when a man can engage in heavy work such as described in this case.

H. H. Patten of Boston, for appellant.

Joseph A. Dennison and Robt. Gallagher, both of Boston for appellee insurer.

CROSBY, J. This is a proceeding under the Workmen's Compensation Act. The deceased at the time of his death was in the employ of the town of North Attleboro, as a laborer, and had charge of a stone crusher owned and operated by the town. As a part of his duties, he was required to break stone into small pieces with a 16-pound sledgehammer,

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the broken pieces to be put into the crusher. At the time of the alleged injury he was breaking stone with the sledgehammer; he had struck several blows and was in the act of striking another, when he collapsed and fell to the ground, dying in about five minutes without regaining consciousness.

It is the contention of the claimant that death was due to the strain of swinging the hammer causing an injury to the heart, which at that time was in a weakened condition from arterio-sclerosis. The insurer contends that upon the evidence the cause of death was a matter of conjecture; this contention was sustained by the Industrial Accident Board on review, and the widow's claim for compensation was dismissed, upon the report filed by the committee of arbitration, a majority of whom found that the employee's death was the result of an injury which arose out of and in the course of his employment.

[1,2] The findings of the Industrial Accident Board, under the act, on all questions of fact are final and cannot be set aside if there is any evidence to support them. St. 1911, c. 751, pt. 3, § 11, as amended by St. 1912, c. 571, § 14. Whether the deceased received an injury which caused his death, and whether the injury arose out of and in the course of his employment, were questions of fact.

[3] Upon the question whether the employee's death was due to the strain of swinging the heavy sledgehammer, thereby causing an injury to an already weakened and diseased heart, or was a matter of speculation and conjecture, the evidence was conflicting. Accordingly the finding of the board must stand. The case is governed in principle by John T. Murphy's Case, 230 Mass. 99, 119 N. E. 657, Sanderson's Case, 224 Mass. 558, 113 N. E. 355, and similar cases. See, also, Grant v. Glasgow & South Western Ry., 1 B. W. C. C. 17.

Decree affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

WORCESTER.

DEMBINSKI'S CASE.

Appeal of EMPLOYERS' LIABILITY ASSUR. CORPORATION.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPENDENCY OF PARENT.

Under Workmen's Compensation Act, pt. 2, §7, as amended by St. 1914, c. 708, § 3, in deciding whether parent is wholly or partially dependent on wages of deceased child, expenses incurred by parent on account of child on one side are to be weighed against wages received by parent from child on other side, and all the circumstances are to be considered in reaching a conclusion.

(For other cases, see Master and Servant Dec. Dig. § 386[2].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPENDENT PARENTS—EXPENSES ON ACCOUNT OF CHILD.

Under Workmen's Compensation Act, pt. 2, § 6, as amended by St. 1914, c. 708, § 2, in awarding compensation to partially dependent parent

* Decision rendered, Nov. 25, 1918. 120 N. E. Rep. 856.

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of deceased minor child, no deduction can be made on account of expenses for clothing annually incurred on account of child, which, though to be considered on issue of dependency, are not to be considered after that fact is determined.

(For other cases, see Master and Servant Dec. Dig. § 386[2].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL—QUESTIONS REVIEWABLE.

Where both single member of Industrial Accident Board in his report, and full board on appeal, state that one question to be decided is whether claimants were dependent on earnings of deceased child, the employee, thus showing point was considered and passed on at hearings, such point is open on appeal, though no request was made respecting it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT OF FATHER TO AWARD.

That father chose to have deceased minor's wages, as well as his own, turned over to his wife as manager of family finances did not diminish his own right to son's wages, or his obligation to support family, and he was entitled to entire award, under Workmen's Compensation Act, for death of son, as a partial dependent; wife not being such also.

(For other cases, see Master and Servant, Dec. Dig. § 386[2].)

Appeal from Superior Court, Worcester County.

Proceeding for compensation under the Workmen's Compensation Act by the defendents of Stanislaw Dembinski, the employee for his death, opposed by the American Woolen Company, the employer, and the Employers' Liability Assurance Corporation, the insurer. Compensation was awarded, the award affirmed by the superior court, and from its decree the insurer appeals. Decree modified, and, as modified, affirmed.

Chas. C. Milton and Frank L. Riley, of Worcester, for appellant.

RUGG, C. J. The deceased employee met his death as the result of injury arising out of and in the course of his employment by a subscriber under the Workmen's Compensation Act. He was about 16 years of age and lived at the home of his father, who was the head of his family, consisting of his wife, the mother of the deceased, and other children. The single member of the Industrial Accident Board and the full board on review found that the actual cash contribution turned over each week to the father and mother by the deceased was $9.89, and that partial dependency of each parent existed to the extent of one-half that sum.

[1-4] It is argued that the amount found to have been contributed by the deceased should be reduced by the sum of $100, which was spent each year by the mother for the purchase of such clothes as the deceased wanted, and which were necessary for him. This contention is not sound. In deciding the question whether a parent is wholly or partially dependent upon the wages of a deceased child, the expenses incurred by the parent on account of the child on the one side are to be weighed against the benefits, including wages, received by the parent from the labor of the child on the other side. All the circumstances are to be considered in reaching a conclusion whether there is dependency in whole or in part. To quote the words of section 7 of part 2 of the act (St. 1911, c. 751) as amended (St. 1914, c. 708, § 3):

"In all other cases," that is to say, in all cases except those where the act by its terms fixes conclusive presumptions as to dependency,

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"question of dependency in whole or in part shall be determined in accordance with the fact, as the fact may be at the time of the injury.

All pertinent elements must be regarded in aceertaining what that fact is. but when the fact of dependency in whole or in part has been established and it becomes necessary to determine the amount of compensation to be paid, then resort must be had to section 6, part 2, of the Act, as amended (St. 1914, c. 708, § 2), and its terms followed. That section contains no reference to any other standard in cases of partial dependency than the "average weekly wages" and the "amount contributed by the employee" out of such weekly wages. It makes no reference to expenses incurred by the parent on account of the child and authorizes no deductions on that account. That such expenses are not to be regarded in this connection was decided in Murphy's Case, 218 Mass. 278, 105 N. E. 635, and Grove's Case, 223 Mass. 187, 111 N. E. 702. These provisions of the act are important in cases where the deceased is a minor child and the claimant a parent under obligation to support. There is nothing in the present record to show that the deceased had ever been emancipated or that the ordinary legal relation between a father and minor son earning wages did not exist. Under such circumstances the father was entitled to the wages of the son and was obliged to furnish him reasonable support, including board and clothes. Tornroos v. Autocar Co., 220 Mass. 336, 341, 107 N. E. 1015. There are no controlling facts to show that either parent acted as banker for the child by keeping the wages of the latter for his use. The record indicates rather that the parent exercised the common-law right of receiving and using as his own the earnings of his minor child. That being so, the amount spent by the agent, presumably from his own funds, for clothing of the deceased son, is not to be deducted. In Grove's Case, where expenditures for "clothing, tuition and incendentials" were deducted from the wages in order to ascertain the amount contributed to the dependent parent, the deceased employee was a son who had reached his majority, and who therefore was responsible for his own clothing. That case is quite distinguishable from the present on this point.

[5, 6] The insurer contends that the finding of the board, to the effect that the father and mother were each partially dependent in equal degree upon the wages if the deceased, is not warranted by the evidence. This point is open on the appeal, although no request was made respecting it, because both the single member in his report and the board on appeal state that one of the questions to be decided is whether the claimants were dependent upon the earnings of the deceased employee. That shows that the point now urged was considered and passed upon at the hearings on the facts. The testimony of the father was that the deceased sometimes—

"would turn his money over to his father and sometimes to his mother, whoever happened to be at home. * * * If the boy needed a suit he would ask his mother to get it for him and she would do so."

The mother testified that the deceased—

"handed her his pay envelope every Friday unopened. She was the treasurer in the home and all the members of the family turned over their money to her. If she was not at home Stanislaw would turn over his money to his father, but the money was finally turned over to her. * * * When he wanted clothes she would go down town with him and buy what he wanted."

A sister of the deceased testified that—

"Stanislaw turned over all the money he earned to her mother. * * * Whenever Stanislaw wanted clothes he went to her mother and either the latter or her father went with him to buy them."

The natural inference from this evidence seems to us to be that the whole contribution was for the benefit of the father, upon whom as head

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of the family rested the entire legal obligation to support his wife and children, and who as father was entitled as matter of law to all the wages of the deceased, his minor son. If he chose to have the wage of his minor son as well as if himself turned over to the wife as his agent in managing the finances of the family, that did not diminish his right to the wages of his minor son or his obligation to support his family, or his ultimate dependence upon those wages in performing his obligation as the head of the family to support its members. That obligation rested wholly upon him. He had not undertaken to shift the burden upon his wife in any degree. He had not abandoned his obligation in this regard, but was discharging his full duty. The real benefit arising from the earnings of the son was his. The entire award should be made to the father. Pagnoni's Case, 230 Mass. 9, 118 N. E. 948. The decree in the opinion of a majority of the court is to be modified accordingly, and as thus modified is affirmed.

So ordered.

SUPREME COURT OF MINNESOTA.

ERICKSON

v.

ST. PAUL CITY RY. CO.

O'MALLEY

v.

SAME. (Nos. 21038, 21046.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—PARTIES ENTITLED TO BENEFIT OF ACT.

Where a workman has completed his day's work and has left the premises where he was employed and is not then engaged in performing any service of his employment and meets with an accident, he is not within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

Appeal from District Court, Ramsey County; Hascal R. Brill, Judge.

Separate actions by Gilbert E. Erickson and by Thomas O'Malley against the St. Paul City Railway Company. Judgment in each case for plaintiff, and from an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant in each case appeals. Order affirmed in both cases.

McLaughlin & McLaughlin and C. N. Conzett, all of St. Paul, for appellant.

W. D. Dwyer, of St. Paul (C. D. O'Brien, of St. Paul, of counsel), for respondents.

TAYLOR, C. Both these actions arose out of the same accident and rest upon the same state of facts and present the same questions. They

* Decision rendered, Nov. 29, 1918. 169 N. W. Rep. 532. Syllabus by the Court.

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were tried separately in the district court, but were argued and submitted together in this court. In both cases the plaintiff recovered a verdict and the defendant appealed from an order denying its motion for judgment notwithstanding the verdict of for a new trial. Our observations apply equally to both cases.

The questions presented are: (1) Whether the facts bring the cases within the workmen's compensatiin law; and (2) whether the evidence is sufficient to sustain the finding of negligence on the part of the defendant.

[1] 1. Defendant asserted in its answer that the cause of action came within and is governed by the Workmen's Compensation Law, and that a common-law action for damages will not lie. By consent the parties tried this issue to the court as a preliminary proceeding before beginning the trial of the case proper, and the court ruled that the case was not within the Compensation Law. Defendant urges this ruling as error.

The plaintiffs were employees of the Northern States Power Company and members of a crew engaged in maintaining, altering and repairing its power lines in and near the city of St. Paul. The crew went wherever their services were needed and when they had completed the work at one point would proceed to another. The company provided an auto truck with a driver on which the tools and materials used by the crew were carried, and upon which the members of the crew rode when moving from one point on the line to another. The company did not convey the members of the crew to the place of work in the morning, nor return them to their homes at night. The truck was kept near the residence of its driver on Rice street and proceeded from there in the morning and returned there at night. Members of the crew going in the direction traveled by the truck were at liberty to ride on it if they wished, and availed themselves of this privilege whenever they found it convenient to do so. On the day of the accident they were at work on Prior avenue a short distance north of University avenue, and in order to complete the job had worked until nearly 10 o'clock in the evening, several hours later than the usual quitting time. The foreman then announced that the work was finished and directed the men to report at another location in the morning. Two of the men had departed previously, the others, including the plaintiffs, got on the truck, which proceeded south along Prior to University avenue, where it collided with one of defendant's street cars. The injuries for which plaintiffs seek to recover were sustained in this collision.

The Workmen's Compensation Law, in section 8203, G. S. 1913, provides compensation for injuries "arising out of and in the course of employment," and in subdivision (i) of section 8230, G. S. 1913, declares that this provision is "not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

It is clear from these provisions that workmen who had completed their day's work and had left the premises where they were employed and are not engaged in performing any service of their employment are not covered by the Compensation Law until they again enter upon the performance of the service for which they are employed. In the case at bar it will be noted that the accident happened after the employees had completed their day's work and had left their place of employment and while they were proceeding toward their respective homes. Although they were riding on the truck of their employer, it clearly appears that their contract of employment imposed no obligations upon the employer to transport them to or from the place of work, and that they were merely riding as licensees to serve their own convenience. Their service for the day had terminated; they had left the place where such service had been

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performed and were no longer engaged in performing any service for their employer. Under such circumstances they were not within the provisions of the compensation Law and the trial court ruled correctly. Otto v. Duluth St. Ry. Co., 138 Minn. 312, 164 N. W. 1020.

[2] 2. Prior avenue, extending in a northerly and southerly direction, crosses University avenue, extending in an easterly and westerly direction, at the foot of the easterly approach to the bridge over the railway tracks at the Minnesota Transfer. Two street car tracks extend along University avenue, over which interurban cars run at frequent intervals, west-bound cars running on the north track and east-bound on the south track. University avenue is a wide street. Immediately north of the west-bound track is a platform at which the west-bound cars receive and discharge passengers. This platform is about 30 feet in length and the west end of it is about 75 feet east of the east line of Prior avenue. Between this platform and the north line of University avenue and north of the west-bound interurban track there is another street car track which extends west along University avenue to Prior avenue and then turns north along Prior avenue. A Hamline car was standing at or near the platform on this last mentioned track and a west-bound interurban car stopped at the platform. The Hamline car started toward Prior avenue, and a trifle later the interurban car started in the same direction along the adjoining track. As the Hamline car turned north on Prior avenue, the truck on which the plaintiffs were riding passed it going south and immediately afterward collided with the interurban car. The view between the driver of the truck and the motorman of the interurban car had been obstructed by a building and by the Hamline car until they were within a few feet of each other.

Defendant insists that the accident resulted solely from the negligence of the driver of the truck and there is no evidence which will warrant a finding of negligence in the operation of the street car. Defendant concedes that the negligence of the driver of the truck is not imputable to his passengers, and that the case turns upon whether the evidence justified the jury in finding that defendant was negligent in the operation of the street car.

Plaintiffs assert that defendant was negligent in failing to have the car under control and in operating it at an excessive and dangerous rate of speed without giving warning of its approach. The evidence is conflicting. The motorman testified that he sounded his gong continuously after leaving the platform until the collision; the occupants of the truck testified that no warning was given. Witnesses testified that the street car had attained a speed of no more than 6 or 8 miles per hour and was stopped within 3 or 4 feet after the collision; other witnesses testified that the street car was running at the rate of 25 miles per hour and proceeded 25 or 30 feet after the collision before it stopped. Defendant argues forcibly that, the distance from the platform where the car had stopped to the point of collision being not more than 125 feet and being upon an upgrade, the car could not have attained any great speed. But a policeman who saw the collision measured the distance that the street car shoved the truck along the track and testified that this distance was 25 feet. If this testimony is true, and the car pushed the truck sideways along the track and upgrade for that distance before the motorman was able to bring it to a stop, it must have been running at a high speed to acquire such momentum. We think that the evidence made the question as to defendant's negligence a question for the jury.

Order affirmed in both cases.

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SUPREME COURT OF MINNESOTA.

NASH

v.

MINNEAPOLIS & ST. LOUIS R. CO. (No. 21019.)*

4. MASTER AND SERVANT—PLEADING—APPLICATION OF WORKMEN'S COMPENSATION ACT.

That a Workmen's Law (see Acts 35 Gen. Assem. c. 147) existed in the state of Iowa at the time of the injury is unimportant; it being a matter of defense, to be pleaded and its application shown.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Appeal from District Court, Ramsey County; Hugo O. Hanft, Judge.

Action by Emma F. Nash, as administratrix, etc., against the Minneapolis & St. Louis Railroad Company. There was a mandate from Minneapolis Supreme Court reversing the judgment for plaintiff entered upon the verdict, after its reversal by United States Supreme Court (242 U. S. 619, 37 Sup. Ct. 239, 61 L. Ed. 531), and from an order denying plaintiff's application for leave to amend, she appeals. Order reversed, with directions.

Barton & Kay, of St. Paul, for appellant.

F. M. Miner, M. M. Joyce, and Donald Evans, all of Minneapolis, for respondent.

QUINN, J. Action brought in the district court of Ramsey county to recover under the federal Employers' Liability Act for the death of plaintiff's husband, which occurred on July 15, 1914, as the result of accidental injury to his person received on the 7th day of that month while in the employ of the defendant in the state of Iowa.

It is alleged in the complaint that at the time of his injury plaintiff's intestate was in the employ of, and at work as a bridge hand for, the defendant on its line of interstate railway in the state of Iowa; that the work in which he was engaged was in connection with and a part of interstate commerce, in which the defendant was then engaged; that the defendant negligently furnished to and for use by the bridge crew, of which the deceased was a member, a certain gasoline car; that it negligently permitted the control lever and machinery of said car to be and remain in such defective condition that, when the car was pushed or moved along upon the track, the engine would automatically go into operation; that while the plaintiff's intestate was engaged in the duties of his employment the defendant, through one of its servants, a member of such bridge crew, negligently caused said car to be pushed along and upon its track and put into operation, so that said car was carelessly and negligently run against and upon the plaintiff's intestate, thereby causing the injury which resulted in his death, all without fault or negligence upon his part.

The plaintiff recovered a verdict upon which judgment was entered. The judgment so entered was ultimately reversed by the Supreme Court of the United States (242 U. S. 619, 37 Sup. Ct. 239, 61 L. Ed. 531), upon the ground that decedent was not, at the time of his injury, engaged

* Decision rendered, Nov. 29, 1918. 169 N. W. Rep. 540. Syllabus by the Court.

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in interstate commerce, and therefore the federal act did not apply. Pursuant to the order of that court a mandate was issued from this court and filed with the district court on February 1, 1918, reversing the judgment entered upon the verdict. Judgment was not so entered when the plaintiff made application to have the judgment entered upon the verdict set aside, and for leave to amend her complaint by eliminating therefrom all allegations to the effect that the defendant's line of road was an interstate highway, and that its buildings and equipments referred to were used in interstate commerce, and that the work in which deceased was engaged at the time of his injury was interstate, and by pleading in lieu thereof certain provisions of the statutes of the state of Iowa, which provide for the survival of actions and the distribution of money recovered as damages for death by worngful act; also section 2071 of the Code of Iowa which, in effect, abrogates the fellow-servant rule of the common law and adopts the doctrine of comparative negligence.

In its resistance to the application to amend, the defendant set forth by way of affidavit that a cause of action to recover damages for death by wrongful act, under the laws of the state of Iowa, would be barred by the statute of limitations in two years; also that at the time of decedent's injury and death there was in force and effect in that state a Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), which determined the rights of the parties with reference to the cause of action set forth in the proposed amendments; that said act provided for the institution of proceedings before the Industrial Commission; that such act superseded the provisions of section 2071; and that, as to employer and employees who had not refused its provisions, it provided the only remedy. The district court denied plaintiff's application for leave to amend, and this appeal is from that order.

The defendant railway company urges that the complaint states a good cause of action under the federal Employers' Liability Act, and that alone; that the proposed amendment abandons that cause of action, and states an entirely different cause of action, arising under the statutes of the state of Iowa; that the amendment would therefore amount to a departure from law to law and pleading of a new cause of action and, being first asserted more than two years after its accrual, is barred by the statute of limitations of the state of Iowa.

[1-3] The important and controlling question, then, is whether the proposed amendment sets forth a new or different cause of action than the one pleaded in the original complaint. We think not. The plaintiff has but one cause of action, viz. the wrongful act of the defendant in causing the injury to plaintiff's intestate which resulted in his death. This cause of action exists by virtue of the statute, which authorizes suit in such cases by the representative of the estate of the deceased person. There was but one right of action, and it would be in no way changed by the proposed amendment. The action was brought by the administratrix, who is the proper party to prosecute it, whether under the federal act or state laws. Whether in one form or the other, it is by the same party, against the same party, in the same court, to recover damages for the same wrong. Mayberry v. N. P. Ry. Co., 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754; Tuder v. Oregon Short Line Ry. Co., 131 Minn. 317, 155 N. W. 200; Basham v. Chicago & G. W. Ry. Co. (Iowa) 157 N. W. 192.

[4]The plaintiff having but one cause of action, the proposed amendment was in support of the original complaint, and we think, in view of section 7783, G. S. 1913, allowing parties in furtherance of justice, either before or after judgment, to amend their pleadings, the amendment should have been allowed. We are not unmindful of the fact that the allowance of amendments is largely in the discretion of the trial court. Under this view of the case, the statute of limitations affords no defense. The contention that there existed in the state of Iowa at the time of a

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Workmen's Compensation Law is unimportant at this time. That is a matter of defense, to be pleaded and its application shown.

The order appealed from is reversed, with directions that the action proceed in accordance with the views herein expressed.

SUPREME COURT OF MINNESOTA.

STATE EX REL. LUNDGREN

v.

DISTRICT COURT OF WASHINGTON COUNTY. (No. 21110.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"USUAL COURSE OF DEFENDANT'S BUSINESS."

The construction of the building referred to in the opinion *held* within the "usual course of the employer's business," within the meaning of the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230).

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series, Usual Course of Business.)

Certiorari to District Court, Washington County; J. N. Searles, Judge.

Certiorari by the State, on the relation of Viktor Lundgren, against the District Court of Washington County, etc., to review an order of that court holding plaintiff not entitled to recover under Workmen's Compensation Act. Judgment reversed, and new trial granted.

M. E. Louisell, of Duluth, for relator.

Wilson & Thoreen, of Stillwater, for respondent.

BROWN, C. J. Proceedings under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230), in which the trial court held that plaintiff was not entitled to recover for the reason, as found by the court, that the employment in which plaintiff was engaged at the time of his injury was not "in the usual course of defendant's business." Judgment was ordered and entered accordingly, and plaintiff sued out a writ of certiorari to review the same.

In stating the facts in the case, which are not in dispute, we refer to the interested parties as plaintiff and defendant; plaintiff being the employee and defendant the employer.

Defendant is a corporation created under and pursuant to the laws of the state, and since its organization has been engaged in the retail lumber and building business. In May, 1917, the company decided to enlarge its business by adding thereto coal and other fuel. To accomplish this it became necessary to build a shed in which to store a supply of coal for the trade. Plaintiff was employed by defendant for a specific part of the work of constructing this shed. In the performance of the work he received an accidental injury, arising out of the employ-

*Decision rendered, Nov. 15, 1918. 169 N. W. Rep. 488. Syllabus by the Court.

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ment, for which he claims compensation. He was an employee of defendant. The employment was for the specific purpose of laying a concrete foundation and concrete floor for the shed, and for an agreed compensation, and the court found that it was not casual, within the meaning of the Compensation Act. The court further found, as a conclusion of law, based upon the facts stated, that the employment was not in the usual course of the business or occupation of defendant, and not therefore within the Compensation Law. Judgment was accordingly ordered dismissing the proceeding.

Whether the learned trial court was right in that conclusion is the only question presented by the record. We are unable to concur in that view of the case. While the courts of the different states are somewhat at variance in defining or applying the particular provision of the Compensation Act here involved, namely, the clause excluding liability of the employer when the employment in which an injury is received is not within "the usual course of the business or occupation" of the employer (Uphoff v. Industrial Board, 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1; Carter v. Industrial Com. [Cal.] 1 Workmen's Com. J. 497; Geller v. Republic Novelty Works [N. Y.] 1 Workmen's Com. J. 691; Boyle v. Mahony et al. [Conn.] 1 Workmen's Com. J.937; Holbrook v. Olympia Hotel Co. [Mich.] 166 N. W. 876), we think the liberal view heretofore followed in our former decisions construing the other clause of the act, namely, "within the scope of the employment," should apply to and control the determination of the question whether a particular employment be within the usual course of the employer's business or occupation. In the respect stated we have uniformly applied a liberal, though substantial, rule, with a view of giving force and effect to the legislative intent in the enactment of the law. State ex rel. v. District Court, 128 Minn. 43, 150 N. W. 211; State ex rel. v. District Court, 131 Minn. 352, 155 N. W. 103, Ann. Cas. 1917D, 866; State ex rel. v. District Court, 129 Minn. 176, 151 N. W. 912; State ex rel. v. District Court, 138 Minn. 131, 164 N. W. 585, L. R. A. 1918C, 116. The rule so applied finds ample support in the authorities elsewhere, and is in harmony with the general canons controlling the construction and application of such statutes. It should control in the case at bar. Here the employer was engaged in the lumber and building material trade, and for the purpose of adding thereto a line of fuel constructed a shed in which to keep and store the new stock. The addition was to become permanently a part of defendant's business, and the shed was a permanent structure, with a solid concrete foundation and floor. While the defendant was not a building contractor, nor engaged in specific work of that kind, the construction of the shed in question was in furtherance of its established business, a necessary part thereof, and we discover no sufficient reason for holding that it was outside of and beyond what is customary and usual in a situation of the kind. That should be the test in construing the statute. The construction of the shed should therefore be held within the usual course of defendant's business, within the meaning and contemplation of the statute. We so hold. This conclusion finds support in the decision rendered in the case of State ex rel. v. District Court of Ramsey County, 138 Minn. 416, 165 N. W. 268.

The case of State ex rel. v. District Court of Douglas County, 138 Minn. 103, 164 N. W. 366, is not in point. There the employment was not only casual, but was for a temporary purpose only.

Judgment reversed, and new trial granted.

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SUPREME COURT OF MINNESOTA.

STATE EX REL. McCARTHY BROS. CO.

v.

DISTRICT COURT OF HENNEPIN COUNTY ET AL. (No. 21103.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

Respondent's husband resided at Bismark, N. D. He was in the employ of the relator, whose principal place of business was at Minneapolis, Minn. He received a salary and traveling expenses, excepting board while at his home. His duties were to solicit the shipment of grain, from west of the Missouri river, to relator, for sale on commission. While on his way home from his field of labor on Sunday morning, he came to his death by accidental drowning, while attempting to cross the Missouri in a rowboat. *Held,* that his dependents are entitled to recover compensation under the Minnesota Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230.)

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

Certiorari from District Court, Hennepin County; Charles S. Jelley, Judge.

Certiorari by the State, on relation of the McCarthy Bros. Company, against the District Court of Hennepin County and others, to review a judgment granting to certain respondents compensation for the death of Arnold Albert Von Hagen. Affirmed.

Cray & Eaton, of Minneapolis, for appellant.
McNamara & Waters, of St. Paul, for respondents.

QUINN, J. Certiorari to the district court of Hennepin county to review a judgment granting to respondents Von Hagen compensation under the Minnesota Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230) for the death of Arnold Albert Von Hagen, husband of respondent Blanche Von Hagen, and father of the three minors mentioned in the complaint. The cause was tried before the court without a jury, and submitted for decision upon the pleadings and proofs of the parties. The court made findings of fact and conclusions of law, and ordered judgment that respondents have and recover the sum of $11 per week for 300 weeks, $100 funeral expenses, and $74.60 costs and disbursements. Judgment was entered accordingly.

On April 8, 1917, and for a number of years prior thereto, Von Hagen resided with his family at their home in Bismarck, in the state of North Dakota. Bismarck is on the east, and Mandan a few miles distant on the west, side of the Missouri river. Von Hagen was in the employ, upon a salary and traveling expenses, excepting board and lodging while at his home, of McCarthy Bros. Company, a Minnesota corporation doing a general grain brokerage business in the city of Minneapolis, this state. The contract of employment was made there. It was Von Hagen's duty to travel about, call upon the grain dealers throughout his territory, and solicit the shipment of grain to relators at Minneapolis, for sale on com-

* Decision rendered, Nov. 1, 1918. 169 N. W. Rep. 274. Syllabus by the Court.

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mission. He was given no directions as to how or where he might travel; such matters being left to his judgment. Relator's business cards, which were presented to its customers, gave Von Hagen's address as Bismarck, N. D. It was there he received his mail.

Decedent spent the night of Friday, April 6th, at his home. The following morning he went to New Salem and transacted some business, returning by way of Mandan, where he arrived at about 7 or 8 o'clock Saturday evening. The channel of the Missouri river, where the railway crosses from Bismarck to Mandan, is about 600 feet wide and spanned by a high bridge. It is about 2 miles from the westerly end of this bridge, across bottom lands, to the easterly yard limits in the city of Mandan. The railway track across these bottoms is on a grade 6 or 7 feet high. On a line between the Mandan yards and the bridge is a mound or high tract of land. The ice in the river had gorged at a point about 12 miles above Mandan. Friday night this gorge gave way, with the result that the railroad track across the bottoms at Mandan was covered with water to the depth of 2 or 3 feet, and all traffic between Mandan and Bismarck was abandoned from Saturday morning until Monday night. On Sunday morning, for the purpose of getting home, Von Hagen and three other traveling men went down to the easterly end of the yards at Mandan, and, with two helpers, embarked in a round-bottomed skiff and started to row to a point near the bridge. When they reached a point near the mound, they concluded that the current and wind were too strong for them to safely proceed further, and they attempted to turn around, when the boat came into contact with the top of a wire fence and capsized. The men held fast thereto, but the current was strong, the water cold, and they were shortly forced to release their hold. All were drowned save one of the helpers.

It is urged that decedent was not within the protection of the Minnesota Workmen's Compensation Act at the time of his death, because it appears that he did not come to his death by reason of an accident arising out of and in the course of his employment; that at the time of the accident he had been through with his work since the preceding day; that there was no necessity for his getting home on Sunday; that in order to do so he undertook an extremely hazardous trip for his own purposes, and not in connection with the business of his employers. We are unable to agree with these contentions. Decedent's duties required his traveling from place to place in his territory, which was several hundred miles from his employers' place of business. It was proper that he have some regular or fixed place for communicating with his employers. His home was near his field of labor. He made it his headquarters, as well as his retreat for over Sunday, as he properly would, and as his employers must naturally have expected and intended he should do. Indeed, all of the correspondence between them so indicates. We see no reason why he might not properly, and without stepping outside the scope of his employment, return to his home from his field of labor on the Sabbath day. The case comes within the rules announced in State ex rel. Chambers et al. v. District Court, 139 Minn. 205, 166 N. W. 185. We think the trial court was justified in finding from the evidence that decedent came to his death by reason of an accident arising out of and in the course of his employment. When he attempted to cross the river, the usual means of travel by rail had been abandoned because of the high water. The only available means of crossing was by boat. Others had crossed over safely by the same means on the previous day. It was left to decedent's judgment as to how or where he might travel. He may have been somewhat negligent, but there is nothing to indicate an intentional or wilful want of care on his part. He was in the act of returning to the shore when the accident occurred. To justify a recovery under the statute, it is unimportant that the employee might

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have been at fault, if not willfully so. G. S. 1913, § 8203. The record justifies the findings of the trial court.

Affirmed.

SUPREME COURT OF MONTANA.

MATTI

v.

CHICAGO, M. & ST. P. RY. CO. (No. 3943.)*

5. COMMERCE — EMPLOYERS' LIABILITY ACT—RAILROAD CONSTRUCTION—EMPLOYEE—"INTERSTATE COMMERCE."

A servant engaged in wheeling bricks from freight car on siding to freight terminal in course of construction was not engaged in "interstate commerce," and could not recover under the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665), when injured through the negligence of a fellow servant.

(For other cases, see Commerce, Dec. Dig. § 27[5]..)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by John Matti against the Chicago, Milwaukee & St. Paul Railway Company. Judgment of nonsuit and order denying new trial, and plaintiff appeals from the order. Affirmed.

E. K. Cheadle, of Lewistown, for appellant.

Chas. J. Marshall, of Lewiston, for respondent.

HOLLOWAY, J. In October, 1913, the Chicago, Milwaukee & St. Paul Railway Company owned and operated, as a part of its system, branch line from Harlowtown to Lewistown and handled all its freight at the Lewistown terminal, at what is designated "the old warehouse." The company was then engaged in constructing a new line of road from Lewistown to Great Falls, and was likewise building a new warehouse in Lewistown several blocks away from the old one. The new warehouse was completed and put to use in January, 1914, and the new line was completed several months later. The company had moved a carload of bricks from a brick manufacturing plant in Lewistown to a point on a spur track near the new building, and plaintiff was employed to take the bricks from the car to the building. Another employee of the company worked inside the car, carrying the bricks and piling them in the car door for plaintiff to place in a wheelbarrow and remove to the building. While these men were thus engaged on October 11, 1913, some bricks fell upon plaintiff's foot, causing injury. He brought this action to recover damages and alleged that the company furnished the workman within the car with a brick-carrying device which was out of repair and dangerous; that the company knew, but plaintiff did not know, that the device was in a defective condition; and that the company, through its

* Decision rendered, Nov. 12, 1918. 176 Pac. Rep. 154.

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employee who was using the device, negligently permitted bricks to fall from it upon plaintiff, causing the injury.

To bring himself within the federal Employers' Liability Act and avoid the defense of fellow servant's negligence plaintiff alleged that, at the time of the injury, the company was engaged in interstate commerce. and that he was employed in such commerce. This last allegation was put in issue, and the company pleaded the defense of fellow servant's negligence. Upon the trial, the court granted a motion for nonsuit, and plaintiff appealed from an order denying him a new trial.

[1, 2] There was not any evidence offered to sustain the allegation that the carrying device was out of repair, and if it be conceded, for the purpose of this appeal, that negligence was shown, it was the negligence of the fellow servant. The circumstances do not admit of the application of the maxim, "Res ipsa loquitur."

[3] In order to make out a prima facie case, it was incumbent upon the plaintiff to prove that he was employed in interstate commerce at the time he was injured. The federal Employers' Liability Act (Act April 22, 1908, c. 149, § 1, 35 Stat. 65 [U. S. Comp. St. 1916, § 8657]) provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

[4] Appellant relies upon the decision of the Supreme Court of Utah in Grow v. Oregon S. L. Co., 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915B, 481; but in the later case of Perez v. Union Pac. R. Co., 173 Pac. 236, the same court, after reviewing the later federal cases and adverting to the fact that the Grow Case was decided by a divided court, said:

"Whether the majority opinion would stand to-day in the light of more recent opinions by the United States Supreme Court is at least a debatable question."

The construction of the act of Congress above involves a federal question with respect to which the decisions of the Supreme Court of the United States are conclusive upon this court.

In Pedersen v. Delaware, L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, the court determined that an employee engaged in bringing materials for the repair of a bridge actually in use as a part of the company's line for the transportation of interstate commerce was engaged in such commerce, but emphasis was laid upon the fact that the bridge was actually in use in interstate commerce and that work of keeping it in repair was so closely related to such commerce as to be, in practice and in legal contemplation, a part of it. The court said:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (Citing cases.) Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In Illinois Cent. R. R. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, it was held that a member of the switching crew engaged in moving cars loaded with interstate freight, from one part of New Orleans to another, was not engaged in interstate commerce, though the company handled interstate shipments and plaintiff at other times moved cars loaded with such freight. The court referred to the language of the act above, and said:

"It is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce."

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In Delaware, L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, it was held that an employee engaged in one of the company's collieries mining coal for use upon locomotives engaged in interstate commerce was not himself engaged in such commerce.

In Shanks v. Delaware, L. & W. R. R. Co., 239 U. S. 556, Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, it was held that a machinist who was injured while moving an overhead countershaft, through which power was communicated to machinery for repairing locomotives used in interstate commerce, was not himself engaged in such commerce. The court said:

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in practical one better suited to the occasion, (see Swift & Co. v. United States, 196 U. S. 375, 398 [25 Sup. Ct. 276, 49 L. Ed. 518]), and that the true test of employment in such commerce in the sense intended is: Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

In Chicago, B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, it was held that a member of a switching crew engaged in moving cars of coal from a storage track in Kansas City to coal bins in another part of the city was not engaged in interstate commerce. It was held to be immaterial whether the coal was brought from points within or without the state of Missouri, and the test applied in the Shanks Case above was reiterated, and the court observed:

"Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes."

Notwithstanding the difference in the facts, the general principles announced above were deemed controlling in each of the following cases involving facts analogous to those presented in the present appeal:

In Raymond v. Chicago, M. & St. P. Ry. Co., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583, there were presented these facts: The Milwaukee main line had been completed from Chicago to Seattle, and had been employed for several years in interstate commerce. In order to shorten the line, lessen the grade, and make more efficient its service, the company commenced cutting a tunnel through the mountain between Horrick's Spur and Rockdale, Wash., with the intention of using the tunnel, when completed, for the main line. Raymond was employed as a laborer in the tunnel work and was injured while in the discharge of his duties and before the tunnel was completed or in use. The court said:

"Considering the suit as based upon the federal Employers' Liability Act, it is certain under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that under the facts as alleged Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act"—citing the Yurkonis and Harrington Cases above.

At the same term, the court decided the case of New York Cent. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. The railroad company, an interstate carrier, was engaged in building a new station and new tracks upon its line. White was employed by it as a watchman to guard tools and materials intended to be used in the new construction work, and while so engaged was killed. The action was brought by his surviving wife. The Supreme Court disposed of the case as follows:

"The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. * * * The admitted fact that the new station and tracks were designed for use, when

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finished, in interstate commerce, does not bring the case within the federal act. The test is: 'Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?' Shanks v. Delaware, Lackawanna & Western R. R. Co., 239 U. S. 556, 558 [36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797]. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 152 [33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153]. And see Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177, 180 [36 Sup. Ct. 517, 60 L. Ed. 941]; Raymond v. Chicago, Milwaukee & St. Paul Ry. Co., this day decided, ante [243 U. S.] 43 [37 Sup. Ct. 268, 61 L. Ed. 583]. The first point therefore is without basis in fact."

Three years prior to the decision in the last case above, a somewhat similar case was before the Circuit Court of Appeals, Eighth Circuit. Bravis v. Chicago, M. & St. P. Ry. Co., 217 Fed. 234, 133 C. C. A. 228. The railway company, an interstate carrier, was engaged in straightening its main line track between Hopkins, Minn., and Aberdeen, S. D., and to that end was building a cut-off near Chanhassen, Minn., to avoid a curve. The new roadbed was practically completed, but the rails were not laid. A concrete bridge was being installed as a part of the cut-off. Bravis was employed by the company to work on the bridge and, while so employed, was injured. The court held that he was not employed in interstate commerce, and said:

"But there were not rails on the roadbed on this cut-off. It never had been used, it was not then used, and until it should be ironed it could not be used, by the defendant in interstate commerce. The mere fact that it was the purpose and intention so to use it at some future time did not make it an instrumentality of interstate commerce. That purpose and intention might be changed, and it might never be used in interstate commerce, or at all. The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant's instrumentality for conducting interstate commerce is too remote and inconsequential to convince."

[5] The decisions in the foregoing cases determine that plaintiff was not employed in interstate commerce at the time he was injured, and therefore he was not entitled to recover upon his own showing.

The order is affirmed.

Affirmed.

Brantly, C. J., concurs.

COURT OF APPEALS OF NEW YORK.

BELCHER ET AL.

v.

CARTHAGE MACH. CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—SUFFICIENCY.

An award of the Industrial Commission for the death of an employee under the Workmen's Compensation Law, based on nothing but hearsay

* Decision rendered, Oct. 29, 1918. 120 N. E. Rep. 735.

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evidence as to the happening of the accident and the resulting injury, cannot be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Chase, Cuddeback, and Hogan, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Law by Margaret F. Belcher and others, to recover for the death of Thomas H. Belcher, employee, opposed by the Carthage Machine Company, employer, and others. From an award by the State Industrial Commission, affirmed by the Appellate Division by a divided court (170 N. Y. Supp. 1068), the employer and insurer appeal. Reversed.

E. C. Sherwood, of New York City, for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Asst. Atty. Gen., of counsel), for respondents.

McLAUGHLIN, J. On the 7th of November, 1916, Thomas H. Belcher died. His widow made a claim on behalf of herself and another dependent against the employer for an award growing out of his death. The State Industrial Commission, upon the theory that it was due to an injury received on the 7th of June preceding, while in the employ of the Carthage Machine Company, made an award to his widow and minor dependent under the Workmen's Compensation Law (Consol. Laws, c. 67). The employer and insurance carrier appealed to the Appellate Division, where the same was affirmed, and they appeal to this court.

The Industrial Commission, after hearings had by it, at which several witnesses were sworn, some in favor and others against allowing the claim, found certain conclusions of fact which, so far as material, are, in substance, as follows: That on the 7th of June, 1916, the claimant's husband was the superintendent and general manager of the Carthage Machine Company; that while thus acting in its plant at Carthage, N. Y., he was struck by a casting which was falling from a pile of castings, and injured; that the injury then received resulted in sarcoma of the ribs and pleura, which, on the 7th of November following, caused his death.

The appellants challenge the correctness of this conclusion, and urge there is nothing to indicate that the death of claimant's husband was due to any injury which he received at the time and place alleged, except that shown by hearsay evidence. In this respect the appellants are correct. There is nothing to sustain this award except hearsay evidence. The question, therefore, is squarely presented whether an award made under the Workmen's Compensation Law can be sustained upon hearsay evidence, uncorroborated by facts, circumstances, or other evidence. I do not think it can.

A persual of this record shows there is nothing to sustain the conclusion of the Industrial Commission that the deceased was injured while in the employ of the machine company on the 7th of June, 1916, other than his own declaration to that effect. It does appear that he stated to his wife and other witnesses that while he was at work in the company's plant on that day a casting fell, by reason of the breaking of a chain, and to avoid being injured he exerted himself to such an extent his side was injured. It also appears that he died of an injury to his side. In this connection, however, it is to be noted that he consulted a physician five days after the injury is alleged to have been sustained, and that he then stated to him that the injury to his side of which he was complaining was due to his being thrown against an automobile lamp while cranking an automobile. This physician testified that he made a thorough examination of the deceased, and did not then discover a fractured rib or any

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other serious injury to the side. The deceased did not consult another physician until some time during the following August, when an examination disclosed a fractured rib. In the meantime it appears he had been in at least two automobile accidents, and when complaining about his side, declared to at least one witness it was due to one of such accidents; and to sustain this statement the foreman of the employer's plant testified that a casting did not fall when the deceased was present. Another employee testified he was at work in the plant at the time when the accident is alleged to have occurred, and he never heard of it; and the one whose duty it was to make a report of all accidents also testified that she never heard of it. If an accident had occurred as here claimed, to the superintendent and general manager, it is fairly to be inferred that some one other than himself would have heard of it, and yet not a single witness was produced to testify thereto. Under such circumstances to permit a claim against the employer to be sustained is to base an award upon sympathy and not evidence.

This court has held that great liberality should be allowed in establishing claims under this statute, but in the final analysis, notwithstanding, such liberality, there must be evidence setting forth facts of a probative character, outside of hearsay statements, to prove the award and show it is fair and just. Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540.

In reaching this conclusion Matter of Sorge v. Aldebaran Co., 218 N. Y. 636, 112 N. E. 1077, and Matter of Fogarty v. National Biscuit Co., 221 N. Y. 20, 116 N. E. 346, have not escaped my attention. They are not in point or controlling of the question here presented. In the former case the only disputed question was whether the accident arose out of and in the course of the employment, and the declarations of the deceased were in part at least corroborated by certain facts and circumstances, while in the latter there were facts and circumstances shown which a majority of this court was of the opinion justified the commission in making the award which it did.

I am of the opinion that the order of the Appellate Division should be reversed, and the determination of the Industrial Commission should be annulled and the claim remitted to the Industrial Commission for rehearing, with costs to abide event.

Hiscock, C. J., and Collin and Crane, JJ., concur. Chase, Cuddeback, and Hogan, JJ., dissent.

Order reversed.

COURT OF APPEALS OF NEW YORK.

HANSEN ET AL.

v.

TURNER CONST. CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT.

Evidence *held* insufficient to show that a servant's death from blood clot and pressure on the brain was the result of any injury received while in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Cuddeback and Hogan, JJ., dissenting.

* Decision rendered, Oct. 29, 1918. 120 N. E. Rep. 693.

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Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Law by Ragnhild Hansen and minor dependents to obtain compensation for the death of her husband, opposed by the Turner Construction Company, employer, and the State Insurance Fund, insurance carrier. From an order of the Appellate Division (171 N. Y. Supp. 1087), affirming by a divided court an award of the State Industrial Commission, the employer and the insurance carrier appeal. Order of Appellate Division reversed, determination of the Industrial Commission annulled, and claim dismissed.

Frederick Hulse, of New York City, for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

McLAUGHLIN, J. The claimant's husband, on the 23d of July, 1917, was in the employ of the Turner Construction Company. While in the cellar of a new building which it was constructing he collapsed and fell. No one saw him fall, but immediately thereafter he was observed by his coemployees, who went to his assistance and found him in an unconscious condition, trembling and frothing at the mouth. They threw water in his face, and shortly thereafter he revived and was taken to a hospital, where he died the following morning. A post mortem examination disclosed that his death was due to a blood clot and pressure upon the brain. His widow and minor dependents presented a claim against his employer, on the ground that his death was due to an injury which he received when he fell. The claim was disputed by his employer and the insurance carrier. The Industrial Commission, after a hearing had, at which evidence was taken, reached the conclusion that the claim should be allowed and accordingly made an award. From this determination an appeal was taken to the Appellate Division (171 N. Y. Supp. 1087), where the same was affirmed, and an appeal then taken to this court.

After a careful consideration of the evidence set out in the record, I have been unable to find any evidence that the death of the claimant's husband was due to an injury received while in the employ of the Turner Construction Company. At the time he collapsed he was working on a dirt floor, and there is nothing to indicate that his fall was due to anything connected with his employment; on the contrary, all of the evidence shows that it was due to an injury which he had previously sustained, or disease with which he had been afflicted. One of the persons with whom he was working, at or immediately prior to the time he collapsed, testified that he stood within a few feet of him, and, while he did not see him fall, he did immediately thereafter see him lying on the floor; that he went to his assistance, and there was nothing to indicate the cause of his fall; that there were no obstructions upon the floor, no pillars or posts near where he fell, or anything to show that the cause of his fall was other than a collapse. The witness was corroborated by another to the effect that he saw the deceased immediately after he fell; that he was then lying on his back, frothing at the mouth, and trembling; that there was nothing to indicate he had tripped or fallen by reason of anything upon the floor, and there were no marks upon his face or head which showed in any way that he had been injured, except a slight scratch upon his cheek.

When he reached the hospital he was immediately put to bed, a careful examination made of his person, and the only evidence of an external injury which could be discovered was an abrasion over his forehead about as big as a quarter of a dollar. There was no evidence of a fracture or concussion of any kind. After his death an autopsy was performed, and this disclosed a subdural hemorrhage, which, according to the physician making the autopsy, had existed for some time prior to

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his collapse; that there was no evidence whatever of traumatism or concussion received at that time, or that his death was in any way caused by an injury then received.

Under such circumstances I do not see how an award could be made. If so, it had for its basis a mere guess or conjecture. The Workmen's Compensation Law (Consol. Laws, c. 67) should receive a liberal construction, but it ought not to be so construed as to take money from one person and give it to another without any legal basis therefor. To hold otherwise would be simply to make the employer an insurer of his employee, and this the Legislature has not as yet done.

The order of the Appellate Division should be reversed, and the determination of the Industrial Commission annulled, and the claim dismissed, with costs in this court and in the Appellate Division against the Industrial Commission.

Hiscock, C. J., and Collin and Crane, JJ., concur.

CHASE, J., concurs in memorandum, as follows: Although it appears that Hansen, on the day of the injury, said that he tripped and fell while at his work, it further clearly appears that such statement was a conclusion on his part, as he stated to the physician who attended him at the hospital that he did not know what happened to him. I am of the opinion that there is no evidence to support the findings of the commission on which the award rests.

Cuddeback and Hogan, JJ., dissent.

Order reversed, etc.

COURT OF APPEALS OF NEW YORK.

LITTS ET AL.

v.

RISLEY LUMBER CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"INDEPENDENT CONTRACTOR"—"EMPLOYEE."

A painter, agreeing to paint three smokestacks for a corporation, was an independent contractor, and not an employee within the Workmen's Compensation Law, where he had absolute control of himself and his helper as to the time when he was to begin work and as to where he should commence, unhampered by directions from the corporation and not subject to its discharge.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

2. MASTER AND SERVANT—RELATION OF EMPLOYEE.

In the relation of employer and employee, the employer has control and direction, not only of the work and its performance and results, but of its details and methods, and may discharge the employee disobeying such control and direction.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

* Decision rendered, Oct. 29, 1918. 120 N. E. Rep. 730.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INDEPENDENT CONTRACTORS.

That an independent contractor employed to paint certain smokestacks for a corporation is directed by the corporation during the performance of the work to scrape off and paint well the rusty spots does not affect his status as an independent contractor within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INDEPENDENT CONTRACTORS.

That an independent contractor, undertaking to paint certain smokestacks for a corporation, is furnished paint and a helper by the corporation does not affect his status as an independent contractor within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Act by May D. Litts and others, opposed by the Risley Lumber Company, employer, and others. An award by the State Industrial Commission was affirmed by the Appellate Division (170 N. Y. Supp. 1093), and the employer appeals. Reversed.

E. C. Sherwood, of New York City, for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

COLLIN, J. The State Industrial Commission decided that Burt Litts died from injuries received as an employee of the Risley Lumber Company while in the course of his employment, under conditions making the Workmen's Compensation Law (Consol. Laws, c. 67), applicable. They, therefore, made an award of compensation to the claimants, which the Appellate Division affirmed by a decision not unanimous. The evidence, however, is not conflicting. We are to determine whether or not it tends to sustain the finding that Litts was, when injured, an employee of the company within the intendment of the act.

Three high smokestacks were a part of the industrial plant of the company at Rock Rift, N. Y. In the spring of 1917 Litts agreed with the company that he would paint the stacks for the sum of $50. Litts was to furnish the ropes, tackle, scaffolding, and implements. The company was to supply the paint and pay the wages of a man to help Litts. On August 21, 1917, the company wrote to Litts, who had not then painted the stacks, as follows:

"Walton, N. Y., August 21, 1917.

"Mr. Bert Litts, Readburn, N. Y.—Dear Sir: When do you expect to be able to paint the stacks that we talked to you about this spring? This ought to be done before the ovens and the boilers are fired up.

"Yours truly, H. C. McKenzie, Treas."

On or about the 28th day of August, 1917, Litts appeared at the plant of the company with the articles furnished by him necessary for painting the stacks. He said to Bailey, the foreman of the company:

"Bailey, I don't know who I can get. Can you furnish me a helper for a little while?"

Bailey sent to him McGraw, who was a day-laborer employed by and on the pay roll of the company. Litts said he would do. McGraw by means of a rope helped to pull Litts up aside the stacks and hold him when he wanted to stop. On the 31st day of August, Litts, because of

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the breaking of the rope, fell and was so injured that he died. On August 30th, Litts, being unable to work on the stack because of rain, told the foreman he was going home. The foreman gave him inside painting to do, which was kept account of separately from that of painting the stacks.

The act contains this definition:

"'Employee' means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants." Section 3, subd. 4.

This definition is not inimical to and does not disturb the distinctions established in the common law between a servant or employee and an independent contractor. The rules which demarcated the relation of master and servant from that of employer and independent contractor are operative in the consideration of claims made under the act. From the definitions and language of the act it is manifest that it deals with employer and employees, and an independent contractor is not within its protection.

[1] In the instant case Litts was an independent contractor. He agreed to do a specific piece of work for the company. In doing it he had absolute control of himself and his helper. He was independent as to when, within a reasonable time after the agreement was made between him and the company, and as to where he should commence the work. He was free to proceed in the execution of it entirely in accordance with his own ideas. He was not to any extent subject to the directions of the company in respect of the method, means, or procedure in the accomplishment. He was not subject to a discharge by the company because he did the painting in one way rather than in another. Those facts, considered by themselves, would constitute him an independent contractor.

[2] In the relation of employer and employee the employer has control and direction, not only of the work or performance and its result, but of its details and method, and may discharge the employee disobeying such control and direction. Uppington v. City of New York, 165 N. Y. 222, 232, 59 N. E. 91, 53 L. R. A. 550; Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. St. Rep. 703; McColligan v. Penna. R. R. Co., 214 Pa. 229, 63 Atl. 729, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Zeitlow v. Smock (Ind. 1917) 117 N. E. 665; Holbrook v. Olympia Hotel Co., 200 Mich. 597, 166 N. W. 876; Fidelity & Deposit Co. v. Brush (Cal. 1917) 168 Pac. 890; Thompson v. Twiss, 90 Conn. 444, 97 Atl. 328, L. R. A. 1916E, 506; Messmer v. Bell & Coggeshall Co., 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1. Moreover, the agreement to paint the three stacks for the specified sum of $50 is indicative, though not conclusive, that Litts became an independent contractor.

[3] The fact that during the progress of the work the company told Litts to do certain acts which were essential to the performance of the agreement, that is, to scrape off and paint well the rusty spots, is not inconsistent with his status or relation as an independent contractor. The relation permitted the company to exercise the degree of control essential to secure the fulfillment of the contract and which did not deprive Litts of the right and opportunity to do the painting in the way he wished. Uppington v. City of New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Boyd v. Chicago & N. W. Ry. Co., 217 Ill. 332, 75 N. E. 496, 108 Am St. Rep. 253; Carleton v. Foundry & Machine Products Co. (Mich. 1917) 165 N. W. 816.

[4] The fact that the company furnished the paint and the helper

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does not conflict with the evidence here that Litts was independent of and uncontrolled by the company in the mode and means of doing the work. Litts was free to apply the paint as he chose. The helper was subject to his orders alone. The power was his throughout the performance of the job to determine and direct the particular manner in which the paint and the appliances should be used and the acts of the helper. Perham v. American Roofing Co., 193 Mich. 221, 159 N. W. 140; Miller v. Minn. & N. W. Ry. Co., 76 Iowa, 655, 39 N. W. 188, 14 Am. St. Rep. 258.

The order should be reversed and the determination of the State Industrial Commission annulled, and claim dismissed, with costs against the State Industrial Commission in this court and in the Appellate Division

Hiscock, C. J., and Chase, Cuddeback, Hogan, McLaughlin, and Crane, JJ., concur.

Ordered reversed, etc.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

ANDREWS

v.

BUTLER MFG. CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW —ABSENCE OF NOTICE—PREJUDICE—PRESUMPTION AND BURDEN OF PROOF.

Under Workmen's Compensation Law, § 18, providing that failure to give the prescribed notice of injury shall bar claim, unless excused on the ground that the employer has not been prejudiced thereby, there is a presumption, which must be overthrown by claimant, of prejudice from want of speedy opportunity to investigate question of accident.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Appeal from State Industrial Commission.

Proceeding by Frank H. Andrews, employee, for compensation under the Workmen s Compensation Law, opposed by the Butler Manufacturing Company, employer, and the American Mutual Compensation Insurance Company, insurance carrier. From a decision of the State Industrial Commission, denying an award, claimant appeals. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Francis Preston, of Syracuse (P. Sidney Hand, of Syracuse, of counsel), for appellant.

Jeremiah F. Connor, of New York City, for respondents.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The claimant demanded compensation for an injury to his eye, practically destroying its usefulness, alleged to have been due

* Decision rendered, November 13, 1918. 172 N. Y. Supp. 405.

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to an accidental flying of a spark from a furnace fire under a boiler. The Sate Industrial Commission found the fact of the accident, that it was within the statute, but refused to make an award, upon the ground that no notice in writing was given to the employer or the insurance carrier, and that both of these were prejudiced by the failure to comply with the requirements of section 18 of the Workmen's Compensation Law (Consol. Laws, c. 67). The claimant appeals from this determination.

The determination of the State Industrial Commission should be affirmed. The presumption is, in the absence of evidence to the contrary, that the failure of the claimant to give the notice required by law is prejudicial to the employer and insurance carrier. It is only where the claimant is able to show that the notice could not have been given, or that the insurance carrier and employer were not, in fact, prejudiced by the failure to give the notice, that there is any justification for the State Industrial Commission to excuse the failure. Sicardi v. Sarnoff Hat Co., 176 App. Div. 13, 162 N. Y. Supp. 337. It is not enough, in given case, that the injury might not have been limited in its effect by prompt action; the employer and the insurance carrier have a right to an opportunity to inquire into the happening of the accident. It is a very simple matter, on discovering an injury to an eye, to fix the time and place of the happening of the same, to come within the provisions of the Workmen's Compensation Law, though in fact it may have been received under circumstances involving no liability, and those who are called upon to pay for the injury have a right to have the matter called to their attention in the manner prescribed by the act. Where this is not done, the claimant must afford the evidence to warrant the State Industrial Commission in excusing the neglect. That is the condition upon which the right to compensation, without respect to the negligence of the employer, is based, and it may not be disregarded.

The determination of the State Industrial Commission should be affirmed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

WILKES et al.

v.

ROME WIRE CO. et al.

In re EMPLOYERS' LIABILITY ASSUR. CORRPORATION, Ltd.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —DEPENDENTS.

Under evidence, *held*, mother and youngest brother of deceased were not dependent on him for support at time of his death, within Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

* Decision rendered. Nov. 13. 1918. 172 N. Y. Supp. 406.

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Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Elizabeth Wilkes and another, mother and brother, as dependents of James Wilkes, deceased, for compensation, opposed by the Rome Wire Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. Awards were made, and the employer and insurance carrier appeal. Reversed and dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Bertrand L. Pettigrew, of New York City, for appellants.

Merton E. Lewis, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent State Industrial Commission.

Michael J. Larkin, of Rome, for respondents Wilkes.

LYON, J. The question presented by this appeal is whether the mother and youngest brother of the deceased were dependent upon him for support at the time of his death.

James Wilkes was in the employ of the Rome Wire Company and met an accidental death. He was receiving an average of $15.80 per week, with 10 per cent bonus. Of this sum he paid his mother $10 per week, "$5 for his board, and $5 towards the home, and to help send the little brother to school, and to buy things." The father was employed in the Rome Iron Mills, Incorporated. He had received in wages for the week immediately preceding the son's death $39.96. He received the week preceding $44.96. His wages for the year were $1,611.81, or an average of $31.60 per week. He gave his wife $20 per week for the support of his family, which consisted of himself, his wife, and their children, James Arthur, Joseph, Howard, and Florence. None of them, excepting James, Howard, and Florence, boarded at home. The mother received from Arthur, Joseph, and Florence $3 each per week, making her weekly income, with the $10 received from James and $20 received from the husband, $39 per week. The husband spent his remaining $11.60 for clothes, filling or grading about the house, and anything the family needed. The wife testified that it cost to support the family during April, the month of the death of the son, $15 to $20. They bought the house in July, 1916 and during the nine months between that date and April 2d, when James was killed, paid $275 thereon, an average of about $30 per month. Furthermore, during the previous years of idleness of the father, debts had accumulated to a large amount. These had been paid off. The son's life insurance of $600 was applied, $400 evidently in the purchase of the adjoining lot, and $200 in payment on the house. This made the aggregate payments on the house $500, with one payment of $25. The wife stated over her own signature that the husband was paying her but $10 per week, and the husband that he was earning but $20 per week. In fact, he was paying her $20 per week, and his earnings for six weeks immediately preceding the death of James were upwards of $40 per week, excepting for two weeks, when they were $39.96 and $39.09 per week. He also testified that in the winter he could not work, while the payroll shows no lessening of his earning power for the winter months. We think this is not a family for whose benefit the Workmen's Compensation Law (Consol. Laws, c. 67) was enacted.

The award must be reversed, and the claim dismissed. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

BAILEY

v.

COLUMBIAN ROPE CO. et al.*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION — COMMUTATION.

State Industrial Commission cannot, under Workmen's Compensation Law, § 27, direct payment to state insurance fund of present value of future installments of compensation awarded to dependent mother of deceased employee, commuted on the basis that such an award is of value equal to a life award, in view of section 16, subd. 4, providing that award to dependent mother is only payable during dependency.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION — COMMUTATION.

The basis for commutation fixed by Laws 1917, c. 705, providing that commutations under Workmen's Compensation Law, § 27, shall be upon the basis of the Survivorship Annuitants' Table of Mortality and the Remarriage Tables of the Dutch Royal Insurance Institution, would not apply to an award to a mother during her dependency.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

Appeal from State Industrial Commission.

Proceeding by Edith Bailey, on behalf of herself, brother, and sister of Harry Bailey, deceased, for compensation under the Workmen's Compensation Law, against the Columbian Rope Company, employer, and the American Mutual Liability Insurance Company, insurance carrier. From a decision of the State Industrial Commission, directing payment to the State Insurance Fund, under section 27 of the Workmen's Compensation Law, of the present value of future installments of compensation awarded to the dependent mother of said deceased, the employer and insurance carrier appeal. Reversed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Merton E. Lewis, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, of Albany of counsel), for respondent State Industrial Commission.

JOHN M. KELLOGG, P. J. By subdivision 4 of section 16 of the Workmen's Compensation Law (Consol. Laws, c. 67), an award to a dependent mother is only payable during her dependency.

[1] In Adams v. New York, Ontario & Western R. R. Co., 175 App. Div. 714, 161 N. Y. Supp. 919, and 220 N. Y. 579, 114 N. E. 1046, it was held that the commission could not commute future payments directed to be made to a widow during widowhood. After that decision it was pro-

* Decision rendered, Nov. 13, 1918. 172 N. Y. Supp. 566.

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vided, by chapter 705 of the Laws of 1917, that commutations under section 27 shall be upon the basis of the Survivorship Annuitants' Table of Mortality and the Remarriage Tables of the Dutch Royal Insurance Institution. That amendment was intended to permit the commutation of an award payable to a widow during widowhood, and to fix a basis for such commutation. But that basis would not apply to an award during dependency. Neither would a life table furnish any basis for such commutation.

[2] It is evident that the commission treated the award in this case as one payable during life, but by subdivision 4 of section 16 of the Workmen's Compensation Law it continues only during dependency. The commission cannot determine that such an award is of value equal to a life award and compute it on that basis. The appeal, therefore, is governed by the Adams Case.

The decision should be reversed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

BALK

v.

QUEEN CITY DAIRY CO. et al.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—HAZARDOUS EMPLOYMENT—"HAZARDOUS OCCUPATION."

A superintendent of wholesale dairy route, who left employer's place of business to instruct a new driver, traveling by street railway, and who, on alighting from car, was killed by an automobile, was not at such time engaged in a "hazardous" occupation, within Workmen's Compensatoin Law, or in service of an employer whose principal business was hazardous.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Hazardous.)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Estelle M. Balk to obtain compensation for the death of Leo P. Balk, opposed by the Queen City Dairy Company, employer, and the American Mutual Compensation Insurance Company, insurer. Compensation was awarded by the State Industrial Commission, and the employer and insurer appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

* Decision rendered, Nov. 13, 1918. 172 N. Y. Supp. 471.

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Jeremiah F. Connor, of New York City, for appellants.
Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.
Robert W. Bonynge, of New York City, for State Industrial Commission.

LYON, J. The deceased, Leo P. Balk, was employed by the Queen City Dairy Company as the superintendent of its wholesale routes. On October 20, 1916, he left his employer's place of business to go upon one of the routes, where there was a new driver, in order to familiarize the driver with the route. In order to reach the route, he was required to travel by street railroad car. In getting off the car, a Ford automobile struck him in the left hip and ran him against a telephone pole, and he sustained injuries which resulted in his death, Novemebr 2, 1916.

The award must be reversed, for the reason that Leo P. Balk was not at the time engaged in a hazardous occupation. He was not in any way engaged in operating a wagon. Glatzl v. Stumpp, 220 N. Y. 71, 114 N. E. 1053. He was merely alighting from a street railway car. In so doing he met with the accident which resulted in his death. He was not in the service of an employer whose principal business was carrying on or conducting a hazardous business.

The award must be reversed, and the case dismissed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

CIMMINO

v.

JOHN T. CLARK & SON ET AL.*

1. ADMIRALTY—JURISDICTION—INJURY TO STEVEDORE.

The work of loading and unloading ships is maritime, as regards jurisdiction of claim for personal injury therein.

(For other cases, see Admiralty, Dec. Dig. § 20.)

2. ADMIRALTY—WROKMEN'S COMPENSATION ACT—INJURY TO STEVEDORE—ADMIRALTY JURISDICTION.

While, when enacted, Workmen's Compensation Law, so far as making it applicable to longshore work in loading and unloading cargoes, was unconstitutional, as an invasion of admiralty jurisdiction, it became effective in that respect, without re-enactment, when by Act Cong. Oct. 6, 1917, § 2, amending Judicial Code, §§ 24, 256 (U. S. Comp. St. 1916, §§ 991[1]-991[25], 1233), recourse to rights and remedies under state Workmen's Compensation Law was permitted.

(For other cases, see Admiralty, Dec. Dig. § 20.)

* Decision rendered, Nov. 13, 1918. 172 N. Y. Supp. 478.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—NOTICE OF CLAIM—PRESUMPTION.

The point not having been raised before the commission, it will, by provision of Workmen's Compensation Law, § 21, be presumed notice of claim was given.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Vincenzo Cimmino for compensation to himself, opposed by John T. Clark & Son, employer, and the Fidelity & Casualty Company, of New York, insurance carrier. From an award of the State Industrial Commission, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Nadal, Jones & Mowton, of New York City (Edward P. Mowton, of New York City, of counsel), for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Robert W. Bonynge, of New York City, for State Industrial Commission.

LYON, J. [1, 2] The question at issue upon this appeal is whether the claimant, being engaged in the performance of a maritime contract at the time he sustained his injuries, should have been denied compensation. On February 26, 1918, the claimant, who was a stevedore at work on board a ship lying at Twenty-ninth street, Brooklyn, N. Y., slipped on the deck, facturing the distal end of the radius of his wright wrist. The work of loading and unloading a ship is as much maritime in its nature as the work of navigating the vessel. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. Following the decision of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451. Ann. Cas. 1917E. 900, Congress amended section 24 and section 256 of the Judicial Code (Act March 3, 1911, c. 231 36 Stat. 1091-1094, 1160 [U. S. Comp. St. 1916, §§ 991(1)-991(25), 1233]), by Act Oct. 6, 1917, c. 97, 40 Stat. 395, § 2, as follows:

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it, and to claimants the rights and remedies under the * * * compensation law of any state."

Following this action of Congress, the Legislature of the state of New York on April 17, 1918, by chapter 249, re-enacted groups 8 and 10 of section 2 of chapter 41 of the Laws of 1914, as amended by Laws 1916, c. 622, and Laws 1917, c. 705, which specified "longshore work, including the loading or unloading of cargoes," as one of the hazardous occupations.

We do not think it was necessary to re-enact the provisions of the New York statute to make them effective as of October 6, 1917. Veasey v. Peters, 142 La. 1012, 77 South. 948. As was said by the New Jersey Court of Errors and Appeals, in Allison v. Corker et al., 67 N. J. Law, 596, 52 Atl. 362, 60 L. R. A. 564:

"But I am prepared to go further, and hold that an unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law. * * * An unconstitutional statute is not merely blank paper. The solemn act of the Legislature is a

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fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes."

The New York statute came into force the moment the amendatory act of Congress was passed.

"While Congress, in the exercise of its power to regulate commerce, * * * can legislate on that subject as well in ports and harbors as in the high seas; but so doing it does not repeal, but suspends, state law upon the subject, and when the act producing this result is repealed, or so modified as to permit the operation of the state law, it becomes again valid and in force [citing Sturgis v. Spofford, 45 N. Y. 446]." Henderson v. Spofford, 59 N. Y. 131; Anderson v. Pacific Coast S. S. Co., 225 U. S. 197, 32 Sup. Ct. 626, 56 L. Ed. 1047.

[3] As to the claim that no written notice was given within ten days, as required by the statute, the point was not raised before the Commission. It is therefore presumed to have been given. Section 21.

The award should be affirmed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

In re COLON.

Appeal of AMERICAN LINOLEUM MFG. CO. et al.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—"DUE NOTICE" OF INJURY.

"Due notice" to an employer of injury to his servant, being such a notice as is required by Workmen's Compensation Law, § 18, means a notice given in the manner and to the appropriate person specified.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Due Notice.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DUE NOTICE TO EMPLOYER.

Injured servant's informal statement in familiar style as to injury received, directed and delivered to assistant foreman, with request that servant's wages be paid to messenger, foreman not being person to whom notice of Workmen's Compensation Law, § 18, might be given, was not "due notice" to employer, required by section.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—AWARD DESPITE FAILURE OF NOTICE—FINDINGS.

If injured servant's failure to give notice to employer, required by Workmen's Compensation Law, § 18, did not result in prejudice to employer and insurer, Industrial Commission, before making award, should make appropriate findings.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

* Decision rendered, Nov. 13, 1918. 172 N. Y. Supp. 475.

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Appeal from State Industrial Commission.

Proceeding by Walter Bennett Colon for compensation for personal injuries under the Workmen's Compensation Law, opposed by the American Linoleum Manufacturing Company, the employer, and the London Guarantee & Accident Company, the insurance carrier. Compensation was awarded by the State Industrial Commission, and the employer and insurance carrier appeal. Award reversed, and matter remitted to the Commission.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

William Butler, of New York City, for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

COCHRANE, J. [1-3] The commission has found that due notice of injury was given to the employer. This means such a notice as is required by section 18 of the Workmen's Compensation Law (Consol. Laws, c. 67), and that it was given in the manner and to the appropriate person specified in that section. The only written notice was of the most informal nature, and was not intended as a compliance with the statute. It was directed and delivered to an assistant foreman, and accompanied a request that the wages of the claimant be paid to the messenger making the delivery. It consisted merely of a statement in a familiar style to a friend as to the injury which the writer received It naturally did not contain all the details required by the statute. The assistant foreman, to whom it was personally delivered, was not a person to whom the statutory notice might be so given. Due notice of the injury, therefore, was not given to the employer. Matter of Claim of Dorb v. Frederick Stearns & Co., 180 App. Div. 138, 167 N. Y. Supp. 415. The finding of the commission is against the undisputed evidence. If the failure to give the statutory notice has not resulted in prejudice to the appellants, the commission should make the appropriate findings.

Award reversed, and matter remitted to the commission. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

IN RE HASSEN.

APPEAL OF UNITED STATES CASUALTY CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"HAZARDOUS EMPLOYMENT."

Under Workmen's Compensation Law, § 2, effective at the time of the accident, November 25, 1916, coal yards were not classified among the "hazardous employments."

(For other cases, see Master and Servant, Dec. Dig. § 361.)

* Decision rendered, November 13, 1918. 172 N. Y. Supp. 430.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"HAZARDOUS EMPLOYMENT"—"OPERATING A WAGON."

A laborer, injured by coal falling on him while he was engaged in unloading coal in a railroad car within the yard of his employer, was not "operating a wagon," within Workmen's Compensation Law, § 2, group 41, as to "hazardous employment," where his duties confined him to the coal yard and he did not drive or deliver coal.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT—COMPENSATION AGREEMENT—AUTHORITY TO APPROVE.

Where a claim was not within Workmen's Compensation Law, commission had no power or authority to approve compensation agreement entered into by employer and employee, pursuant to section 20, or to enforce its execution, since no act or acquiescence could confer jurisdiction of the subject-matter.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

4. MASTER AND SERVANT—COMPENSATION AGREEMENT—PARTIES.

If claim was within jurisdiction of commission, insurance carrier did not need to be a party to compensation agreement made pursuant to Workmen's Compensation Law, § 20.

(For other cases, see Master and Servant, Dec. Dig. § 400.)

Appeal from State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Law by George Hassen, employee. The employer and employee entered into an agreement for payment of compensation, which was affirmed by the State Industrial Commission, and thereby became an award. Application to vacate award denied, and the United States Casualty Company, insurance carrier, appeals. Reversed, award vacated, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

William H. Hotchkiss, of New York City, for appellant.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

COCHRANE, J. Claimant was a laborer employed in a coal yard. He was injured by some coal falling on him while he was unloading it into a wagon from a railroad car standing in the yard of the employer. The employer and employee entered into an agreement under section 20 of the Workmen's Compensation Law (Consol. Laws, c. 67) for the payment of compensation, which agreement was in the form provided by said section and was subsequently approved by the commission. By virtue of the statute (section 20) such approval became an "award." Payments were made under this award, and subsequently the insurance carrier made an application to the commission to vacate it, on the ground that the claim was not within the statute and that the commission was therefore without jurisdiction. This application was denied by the commission, and the insurance carrier appeals to this court.

[1, 2] The accident occurred November 25, 1916. At that time coal yards were not classified among the hazardous employments under section 2 of the Workmen's Compensation Law, and the employer was not engaged in conducting any hazardous employment under the act. It is suggested that, because the claimant was loading coal into a wagon, he was engaged

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in the operation of the wagon, and that hence his claim falls within group 41 of section 2 of the act. It does not clearly appear what caused the coal to fall on the claimant, but there is no suggestion that any movement of the wagon or defect therein occasioned or contributed to the accident. Claimant was not a teamster, nor in any way engaged in the operation of the vehicle. His duties confined him to the yard. He describes himself as a laborer, and expressly disclaims that he was a driver, or that he delivered coal. The case is distinguishable from Matter of Dale v. Saunders Brothers, 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1918B, 703, where the claimant was a teamster operating a wagon, and the work of loading the wagon was incidental to his duties in the operation thereof. Here the claimant was not engaged in the business of operating a vehicle, as in the Dale Case, and his work in loading the wagon was not incidental to such operation, but was his principal and in fact his only work at the time of the accident. The case is not distinguishable in this particular from Matter of Roberto v. John F. Schmadeke, Inc., 180 App. Div. 143, 167 N. Y. Supp. 397, where the claimant was injured while loading coal into an automobile truck for delivery to customers. The claim was disallowed in that case, although this particular point was not there raised. As well might it be urged that, because the claimant was unloading coal from the railroad car into a wagon, he was engaged in the operation of a railway, and so within group 1 of section 2.

[3, 4] The commission was of the opinion that the claimant was not within the act, but thought that by their agreement the parties had placed it beyond their power to question the jurisdiction of the commission. The insurance carrier, the only appellant herein, was not a party to that agreement. It did not need to be a party, if the claim was within the jurisdiction of the commission. But no act or acquiescence on the part of any one can confer jurisdiction of the subject-matter of a controversy on a court or body exercising the same. This principle is firmly established, and, if there ever was any doubt about it, such doubt was removed by the recent case of Matter of Doey v. Clarence P. Howland Co., Inc., 224 N. Y. 30, 120 N. E. 53. The following extract from the opinion in that case finds special pertinency here:

"The fact that the determination of the commission had been acquiesced in to the extent that certain payments had been made thereunder, and an appeal had not been taken therefrom, could not prevent either of such parties raising the question at any time they saw fit. This follows from the fact that the determination was a nullity. It bound no one. It was a void determination."

It follows that the commission had no power or authority to approve the agreement or to enforce its execution.

The decision should be reversed, the award vacated, and the claim dismissed. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

URBAN

v.

TOPPING BROS. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—"OUT OF AND IN THE COURSE OF THE EMPLOYMENT."

Where employee, five minutes after quitting time, after washing, put on his coat and hat, and then turned back to look about the working room for his companions, and in doing so put his head into an elevator shaft and was killed by descending elevator, the accident did not arise "out of and in the course of the employment," within Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Paul Urban, administrator, for compensation for the death of Paul Urban, Jr., deceased employee, opposed by Topping Bros., employers, and the Allied Mutuals Liability Insurance Company, insurance carrier. From an award of the State Industrial Commission, the employers and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Arthur Butler Graham, of New York City (Howard J. MacLachlan, of New York City, of counsel), for appellants.

Merton E. Lewis, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent State Industrial Commission.

LYON, J. The serious question involved upon this appeal is whether the injury arose out of and in the course of the employment. Paul Urban, the deceased, was injured while at work for Topping Bros. Preliminary to the taking of evidence, the deputy commissioner inquired as follows:

"Is this case contested?

"Mr. Spiegel (plaintiff's attorney): It apparently is.

"Mr. Gardiner: On the ground the case does not come rightfully under the Compensation Law.

"Mr. Archer: That he wasn't engaged in a hazardous occupation?

"Mr. Gardiner: No; the accident was not one that arose out of and in the course of employment."

The case is stated by the attorney for the claimant as follows:

* Decision rendered, November 13, 1918. 172 N. Y. Supp. 432.

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"Mr. Spiegel: This concern ceased work at 5:30. The accident occurred at 5:35, five minutes really after quitting time.

"Mr. Archer (deputy commissioner): On the premises?

"Mr. Spiegel: Yes. A good many employees had left the place, but my man and several others were still on the premises, although they quit actual work. There was an elevator on the premises, and the deceased had stepped up to the elevator in order to call two coemployees, with whom he usually went home. He didn't find them on his floor. In order to call them, he looked into the elevator shaft; this elevator shaft had a door in front of it, which had a square opening about the height of a man's head, and as he put his face in there to call for these friends, at that moment the elevator descended, and he sustained injuries from which he died. The contention is not so much that while he was on the premises the accident occurred, but in the course of his employment. My friend's contention is, possibly, that it did not arise out of and in the course of his actual employment. That is the only bone of contention. I think everything else is conceded. There would be no dispute to anything else. We would like a ruling if this falls within the Compensation Law.

"Mr. Archer: What's your statement?

"Mr. Gardiner: The man had finished his work for the day, had washed up, had put on his coat and hat and started out, and then returned to call down the elevator shaft to—

"Mr. Archer: By 'started out' you mean he actually left the premises?

"Mr. Gardiner: No; he had gone as far as the door, and came back simply for his personal business, and not in connection with anything relating to his employment. * * * Then the question of dependency is also disputed, after we come out of that.

"Mr. Archer: I believe you have agreed absolutely on the statement of fact.

"Mr. Spiegel: I believe so.

"Mr. Archer: Let's go ahead and try the question of dependency. * * *

"Mr. Gardiner: The commissioner hasn't decided as yet that he comes under the Compensation Law.

"Mr. Archer: No; I have made no decision yet; but I think you have agreed on the question of fact. Case is adjourned."

On Monday, April 8, 1918, the hearing was resumed, and the attorney for the insurance carrier said:

"Mr. Gardiner: We were to have a decision as to whether or not it was in the course of his employment. Did the commissioner go into that?

"Deputy Commissioner Archer: I think it was. However, that will be a part of my study of the case, but I think it was. My mind is still open on that matter. Call your witness."

The treasurer of the employers and the plaintiff's father were then examined. Adjournment was then had until April 15th, when the following appears on the record:

"Mr. Archer: This is a dependency case, as I understand it, and everything is stipulated except the question of dependency.

"Mr. Gardiner: Yes.

"Mr. Archer: We attempted to hear this case last week, but became convinced that an interpreter was necessary; hence the adjournment to this date. We have an interpreter now, and will proceed with the case on the question of dependency."

The plaintiff's father and mother were examined at length. The meetings of March 28th and April 8th and 15th are the only occasions on which the matter of whether the accident arose out of and in the course of the employment were discussed. Hearings were had on April

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22, May 8, and May 20, 1918, at none of which was there an appearance, except at the meeting at which an allowance was made to claimant's attorney for legal service. The award appealed from was made May 20th, in which this statement appears:

"At the hearing held on April 15, 1918, it was stipulated on behalf of the employer and insurance carrier that the only question raised in this case was the question of the dependency of the claimants."

It was found as a conclusion of fact:

"(4) The injuries which resulted in the death of Paul Urban, Jr., were accidental injuries, and arose out of and in the course of his employment."

It was plainly the intention of the attorney for the employer and insurance carrier not to waive the question as to the accident not having arisen out of and in the course of the employment. It was understood that the statement of claimant's attorney, made at the meeting of March 28th, was a stipulation of the facts as to the manner in which the decedent's death was caused, and not a stipulation that the question was not in the case. The proceedings of April 8th make this plan. No further proof was offered upon the subject, and it is evident that the fact of the manner of decedent's death had passed from the mind of the commissioner at the time the award was made, or that he reached the conclusion that the accident arose out of and in the course of the young man's employment. From the decision of the commission we judge the former to be the case. It is a material point of law in the case, and we shall therefore discuss it.

The decedent had plainly finished his employment, which was assistant order clerk in a wholesale hardware business, laying out goods on order. He had washed up, put on his coat and hat, and gone to the door to go out. It was 5:35. His quitting time was 5:30. Remembering that the companions with whom he usually went home were still there, he returned; not finding them in the room upstairs, he thrust his head in the open space and called to them. The descending elevator crushed his head. At the time he met his death he was not engaged in the business of his employment. He had ceased that. His act of turning back, looking about the room for his companions, and putting his head into the elevator shaft, was his own voluntary act. He had deviated from the direct and ordinary route of passage for purposes of his own.

The award must be reversed, and the case dismissed. All concur, except John M. Kellogg, P. J., who dissents.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

PIERSON

v.

INTERBOROUGH RAPID TRANSIT CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION—INJURIES IN COURSE OF EMPLOYMENT.

Amendment of Workmen's Compensation Act 1914, art. 1, § 3, subd. 4, defining "employee" as one in hazardous occupation, by Laws 1916, art.

* Decision rendered, November 8, 1918. 172 N. Y. Supp. 492.

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622. did not bring workman injured out of the course of his employment within the act, in view of section 7, defining an injury as one arising out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF EMPLOYMENT—"L" GUARD.

An elevated railway guard having two hours off, who stayed on train to ride to office for pay and thence to a dentist, and was injured in a collision, was not within the Workmen's Compensation Act, and could recover in a civil action.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, L.)

Appeal from Trial Term, New York County.

Action by Peter J. Pierson against the Interborough Rapid Transit Company. Judgment on verdict for plaintiff, and order denying motion for new trial (102 Misc. Rep. 130, 168 N. Y. Supp. 425), and defendant appeals. Affirmed.

Argued before Clarke, P. J., and Dowling, Smith, Page, and Shearn, JJ.

James L. Quackenbush, of New York City (Frederick J. Moses, of New York City, of counsel), for appellant.

Frank L. Tyson, of New York City (John C. Robinson, of New York City, of counsel), for respondent.

SHEARN, J. Plaintiff was employed by defendant as a guard on its elevated railway. He had been on duty for several hours, finished his trip at the terminal, and was off duty on what is known as a "swing" of about two hours. His time was at his disposal for that period. He was in the company's uniform, and instead of leaving the train and the premises of the defendant he remained upon the same train when it started on its southerly trip. His purpose in taking the trip was to go to his dentist's on Fifty-Ninth street, but it was his intention to stop off the train at 129th street, where the employees receive their pay, and, if there were not too many in line, to collect his pay. After the train had left the terminal, and before reaching 129th street, it came into collision with another train on the same track, and the plaintiff sustained the injuries for which the damages have been awarded.

The appellant's claim is that the plaintiff's remedy for this accident is provided by the Workmen's Compensation Law (Consol. Laws, c. 67). Its argument is based mainly upon the amendment of the law made by chapter 622 of the Laws of 1916, which went into effect before this accident. It is claimed that this injury comes within the provisions of the act by reason of change in the definition of "employee." Under the act of 1914 "employees" was defined as follows:

Article 1, § 3, subd. 4: "'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer, and shall not include farm laborers or domestic servants."

While the act contained this definition, it was held in De Voe v. N. Y. State Railways, 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A, 250, that the employee was entitled to compensation only if he were engaged in a hazardous employment at the time of the accident. De Voe, it

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will be recalled, was a motorman of a street railway, who had finished his work for the day and was hurrying to catch a street car to go to an adjoining town to have his watch tested as required by the rules of the company, and was struck by an automobile and killed. Following the decision of that case in the Appellate Division (169 App. Div. 472, 155 N. Y. Supp. 12) the act was amended by chapter 622 of the Laws of 1916. The amendment gave this definition of "employee":

"'Employee' means a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer, and shall not include farm laborers or domestic servants."

[1] It will be observed that, instead of defining "employee" as one engaged in a hazardous employment in the service of an employer, it is now one engaged in the enumerated occupations, who "is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment." The claim is that this does away with the settled and recognized limitation that the injury must arise out of and in the course of employment. The argument is not sound. The amendment does broaden the definition, so as to make it clear that an employee who is injured while employed by one whose principal business is to carry on a hazardous employment is entitled to compensation, irrespective of whether what he is doing at the time is hazardous or not. The argument takes no account of section 3, subd. 7, which reads now as it did in 1914, namely:

"'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment."

While, therefore, the definition of an employee has been changed, there has been no change in the law that limits recovery to injuries that come within section 3, subd. 7.

There is, however, more to be said in favor of appellant's contention. In the first place, the concluding sentence in the opinion in the De Voe Case reads:

"He was not injured while on duty nor in his working hours nor on his way to or from his duty within the precincts of the company."

That does not hold, but it seems to intimate, that one on his way to or from his duty within the precincts of the company would be entitled to compensation, and there are cases in the Appellate Division that so hold. For example, in the case of a man employed in the subway who reported for work, but was considered too drunk to work, and was sent away, and was injured while walking out of the subway, it was held that this injury arose out of and in the course of his employment, and compensation was allowed. Kiernan v. Friestedt Underpinning Co., 171 App. Div. 539, 157 N. Y. Supp. 900. Furthermore, it seems right that a motorman or guard, who has been taken to the end of the line and is compelled to lay off for two hours or so before the next run, should be protected by the act in the case of an injury sustained while in the precincts of the company awaiting his next tour of duty. There would, of course, be no question but that a motorman who had thus gone to the end of his line, and who was provided a waiting place a few stations removed, and who rode on the train to that waiting place, and was injured on the way, would be said to have sustained an injury growing out of and in the course of his employment.

In view of the numerous decisions of the Appellate Division tending in this direction (Countryman v. Neuman, 174 App. Div. 900, 159 N. Y. Supp. 1108; Rzepczynski v. Manhattan Brass Co., 179 App. Div. 952, 165 N. Y. Supp. 1110; McCabe v. Brooklyn Heights R. R., 177 App. Div. 107,

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162 N. Y. Supp. 741), and in view of the intimation at the conclusion of the opinion in the De Voe Case, it might be persuasively argued that this case was within the act, if it were not for the recent explicit opinion of the Court of Appeals in Daly v. Bates, 224 N. Y. 126, 120 N. E. 118, in which Judge Hogan quotes the opinion of the Court of Appeals in Heitz v. Rubbert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, as laying down the law applicable to these cases. In the Heitz Case the accident happened while the act of 1914 was in effect, but the amendment of 1916 was in effect at the time of the accident in the Daly Case. However, as above stated, I do not think that the amendment makes any difference. Judge Hogan says:

"The statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words 'arising out of and in the course of employment' are conjunctive, and relief can be had under the act only when the accident arose both 'out of' and 'in the course of' employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work."

[2] In view of this opinion, I do not see how it is possible to hold that this accident was within the purview of the act; for this workman was off duty, was on his way to his dentist, and did not have to report back for duty for two hours. The injury was therefore not received while he was doing the duty he was employed to perform, nor was it a natural incident of the work.

[3, 4] It is also claimed that there is no proof of negligence; but as the plaintiff was a passenger, and the accident grew out of a collision between the train he was on and another train, and the circumstances of the accident are fairly shown, the rule of res ipsa loquitur applies. No proof was put in by the defendant to overcome the presumption of negligence.

It is claimed that the verdict is excessive; but a consideration of the serious nature of the injuries, the terrible suffering that the man endured by reason of his burns, the long and painful treatment, the fact that he still has open sores on his body, that these keep him awake two or three nights a week, and that he will never get over them, make the verdict not unreasonable, in spite of the fact that his earning capacity has been but little impaired.

The judgment and order should be affirmed, with costs. Order filed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

SMITH

v.

F. & B. CONST. CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT – LOSS OF USE OF EYE—PROPRIETY OF AWARD.

Servant who, with powerful glasses, had vision of one-third with injured right eye, if he closed other eye, so that he could have only one eye,

* Decision rendered, November 18, 1918. 172 N. Y. Supp. 581.

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and, if he used injured eye, had but one-third vision, was properly awarded compensation for permanent loss of use of right eye, considered as equivalent of loss of eye.

(For other cases, see Master and Servant, Dec. Dig. § 385[11¼].)

Lyon, J. dissenting.

Appeal from State Industrial Commission.

Claim by William Smith for compensation under the Workmen's Compensation Law, opposed by the F. B. Construction Company, the employer, and the London Guarantee & Accident Company, insurance carrier. From an award by the State Industrial Commission, affirming its prior award, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

William Butler, of New York City, for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for Industrial Commission.

A. H. Schwarz, of New York City, for claimant.

JOHN M. KELLOGG, P. J. By the award appealed from claimant has been compensated for the "permanent loss of use of the right eye considered as the equivalent of the loss of such eye."

With the use of powerful glasses he has a vision of about one-third with that eye, but in order to obtain it he must close the other eye. In any event he can only have one eye, and if he uses the injured eye he has the vision of but one-third of an eye.

The case differs from Frings v. Pierce-Arrow Motor Co., 182 App. Div. 445, 169 N. Y. Supp. 309, where by use of glasses claimant had the normal vision of the injured eye. There, without glasses, he had vision of but one eye, and with the use of glasses had the normal vision of the other eye only. In any event, he had the full vision of one eye, and could use either eye at pleasure. But here, to get a third vision from the right eye, he must forego entirely the use of the left eye. I think the rule in the Frings Case should not be extended beyond the facts there found.

I favor an affirmance of the award. All concur, except Lyon, J., who dissents.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

STRADAR

v.

STERN BROS. ET AL.

IN RE EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—APPLICATION OF STATUTE—"UPHOLSTERING"—CARPET LAYER.

Laying carpets is not "upholstering," within any of the definitions given the word by standard lexicographers, and especially not within Workmen's Compensation Law, § 2, group 16, declaring hazardous employments. "Manufacture of * * * ; upholstering; manufacture of * * *," a manufacturing group.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from State Industrial Commission.

Proceeding by Charles F. Stradar under the Workmen's Compensation Law for compensation for injury to himself, opposed by Stern Bros., employers, and the Employers, Liability Assurance Corporation, Limited, insurance carrier. From an award of the State Industrial Commission in favor of claimant, the employers and insurance carrier appeal. Reversed and dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

WOODWARD, J. The claimant, in presenting his claim for compensation, gave his occupation as that of a carpet layer. The employers' first report of the injury gave the same answer to the question as to the nature of claimant's work, and no one disputes these declarations. Indeed, the award is based upon the fact that, while the claimant was engaged in laying a carpet in the Democratic Club at 617 Fifth avenue, New York, he dropped his knee upon a tack, receiving an injury resulting in subsequent infection of his limb. The State Industrial Commission has made an award upon the strength of testimony by a member of a labor union that a carpet layer is an upholsterer, within some of the provisions of a labor organization, holding that the injury comes within the limits of group 16. This group of the Workmen's Compensation Law (Consol. Laws, c. 67), § 2, is:

"Manufacture of furniture, interior woodwork, organs, pianos, piano actions, canoes, small boats, coffins, wicker and rattan ware; upholstering; manufacture of mattresses or bed springs."

* Decicision rendered, November 13, 1918. 172 N. Y. Supp. 482.

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[1-3] It is entirely obvious that "upholstering," as used here, is, in its manufacturing sense, a branch of lounge and parlor chair manufacturing, or a similar line of work in connection with the permanent decoration of houses, and no rule of construction can justify extending the word "upholstering" to cover the mere laying of a carpet. "Upholsterer" is defined by Webster:

"To furnish [rooms, carriages, bedsteads, chairs, etc.] with hangings, coverings, cushions, etc.; to adorn with furnishings in cloth, velvet, silk, etc., as to upholster a couch; to upholster a room with curtains."

The same authority defines "upholsterer" as:

"One who provides hangings, coverings, cushions, curtains and the like; one who upholsters."

We are required to give to words in a statute their ordinary and obvious meaning. The Workmen's Compensation Law is no exception to this rule, when cases reach this court. We may take judicial notice, in the absence of legislative enactment, that the mere laying of a carpet is not a hazardous occupation; it is not within the spirit of the law. The group in which we find upholstering is a manufacturing group, is a group in which machinery and tools and manufacturing conditions exist; and the word should be given the construction which its association in the statute suggests, even though it might have a broader meaning under exceptional circumstances. This is specially true when the word does not come within any of the definitions, fairly understood, given by the standard lexicographers. The Legislature has, with reasonable clearness, extended the original scope of the act; but it has not yet made the laying of carpets a so-called hazardous occupation.

The award should be reversed, and the claim dismissed. All concur, except John M. Kellogg, P. J., and Cochrane, J., who dissent.

SUPREME COURT OF OKLAHOMA.

LAHOMA OIL CO. ET AL.

v.

STATE INDUSTRIAL COMMISSION OF OKLAHOMA ET AL.
(No. 9660.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD—EFFECT OF DEATH.

Where one entitled to compensation under the Workmen's Compensation Act (chapter 246, Laws 1915) secured a determination and award for permanent disability, and died before the lapse of the maximum number of payments had been made according to the terms of the award, the right to compensation under the award ceased with his death.

(For other cases, see Master and Servant, Dec. Dig. § 393.)

Appeal from State Industrial Commission.

Proceeding by Timothy A. Downing for compensation under the Workmen's Compensation Act, opposed by the Lahoma Oil Company, the

* Decision rendered, Sept. 3, 1918. Petition for rehearing withdrawn Nov. 14, 1918. 175 Pac. Rep. 836. Syllabus by the Court.

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Maryland Casualty Company, and others. From an award made by the State Industrial Commission, the Lahoma Oil Company and the Maryland Casualty Company appeal. On the death of said Downing, the action was revived in the name of Malinda Downing, administratrix. On Motion to dismiss action. Motion sustained.

Ross & Thurman, of Oklahoma City, for appellants.

Burdette Blue and H. H. Montgomery, both of Bartlesville, and Fulton, Shirk & Danner, of Oklahoma City, for respondents.

OWEN, J. Petitioners appeal from an award made by the Industrial Commission on Novebmer 26, 1917, to Timothy A. Downing for $5,000, to be paid at the rate of $10 per week for a period of 500 weeks. After the appeal was perfected to this court, Downing died as the result of the injuries for which the award was made, and the action was revived in the name of Malinda Downing, administratrix of his estate. The case is before us on motion to dismiss the action on account of the death of Downing.

In support of the motion to dismiss it is contended, first, that an award made by the commission under the Workmen's Compensation Law (Laws 1915, c. 246) does not confer upon the injured workman a property right or an interest which upon his death becomes a part of his estate; and, second, that the Compensation Act does not apply to accidents resulting in death.

Two rights of action exist under the law of this state for wrongful injuries resulting in the death of a person. One is the right of action which survives to the estate, or the personal representatives, to recover damages sustained by the estate, and for pain and suffering, medical expenses, etc. The other is the right of action given for the benefit of the widow and children or next of kin for the pecuniary loss sustained by them on account of the death. It was held by this court in the case of St. L. & S. F. R. R. Co. v. Goode, Adm., 42 Okla. 784, 142 Pac. 1185, L. R. A. 1915E, 1141, that a recovery on one such cause of action does not bar recovery on the other.

[2] The language of section 1, art. 6, of the Compensation Act, is:

"It is not intended that any of the provisions of this act shall apply in cases of accidents resulting in death, and no right of action for recovery of damages for injuries resulting in death is intended to be denied or affected."

Counsel for respondents contend that this section applies only to the right of action accruing to the next of kin for pecuniary loss sustained on account of the wrongful death of the employee, arguing that the Compensation Act supplants the right of action for pain, suffering, medical expenses, etc., and that an award made to the employee vests at his death in his representatives. We do not agree with this contention.

The compensation to be paid to the employee does not depend upon whether the injury was wrongfully caused by the negligence of the employer. It is paid when an accidental injury is sustained arising out of and in the course of the employment, without regard to the fault as a cause of such injury, except where the injury is sustained by the willful intention of the injured employee, or where the injury results directly from the willful failure of the injured employee to use a guard or protection furnished for his use. The act recognizes that a personal injury suffered by an employee arising out of and in the course of employment is an incident of the business in which he is employed. In consequence of that, the act provides that, as a matter of justice, the resulting burden should be borne by the business without regard to the question of fault on the part of the employer or employee.

[1] The act makes no reference to the payment of the unpaid install-

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ments of the award, in the event of death of the employee, to dependents or next of kin. It, in effect, provides that the employee, if accidentally injured, shall receive in lieu of his wages the amount fixed by the terms of the act. The average weekly wage of the employee is taken as a basis upon which to compute the compensation. Had there been no injury, the payment of wages would cease on the termination of the relation of master and servant. When the relation is terminated by death of the employee, the occasion for making compensation in lieu of wages comes to an end.

The act provides that the compensation shall be paid only to the employee, and that the claim for such compensation shall not be assigned and shall be exempt from claims of creditors. The cause of action for pain, suffering, medical expenses, etc., arising from a wrongful injury, survivies under the statute (section 5281, R. L. 1910) to the personal representatives when the injury results in the death of the employee, and becomes part of his estate and is subject to the claims of creditors. Section 7, art. 23, of the Constitution, provides:

"The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

By the terms of the Compensation Act the amount of compensation for each injury is limited and based upon the amount of the weekly wage. The provision excepting injuries resulting in death was no doubt incorporated so as to make the act in harmony with this provision of the Constitution under which the amount recoverable cannot be limited if death results from the injury.

So long as the employee was alive, the Industrial Commission would have jurisdiction to hear and determine his claim for compensation, and this jurisdiction would be exclusive of the courts of the state under section 2, art. 6, of the act. When his injuries resulted in death, the Compensation Act. under the terms of section 1 of article 6, above quoted, would no longer apply, and the Industrial Commission would have no further jurisdiction. The cause of action, if any, arising from the death resulting from such injuries, would survive to such representatives, under section 5281 of the Statute, as though the Compensation Act had never become a law. That section of the statute provides for the survival of the action if the employee might have maintained an action had he lived. The effect of the Compensation Act was to afford to the employee a special procedure under which to maintain his action where the injuries do not result in death. After his death his representatives may maintain their action, but not under the Compensation Act.

[3] This construction avoids any conflict between the Compensation Act, section 5281 of the Statute, and section 7, art. 23, of the Constitution. The act must be construed to be in harmony with the provisions of the Constitution and the various sections of the statute law of the state, so as to give meaning and effect to all, if such construction is possible without doing violence to the spirit and language of the act. Roma Oil Co. v. Long, 173 Pac. 957 (not yet officially reported); Matthews v. Rucker, 170 Pac. 492.

Our attention has not been called to any decision exactly in point on the question involved here. The compensation acts of the various states, to which our attention has been called, differ materially from the provisions of our act. The acts of some of the other states include accidents resulting in death, and provide for payment of compensation to the dependent in the event of the death of the employee, in this respect differing from the act in this state. The courts of New Jersey, Massachusetts, and New York held that payments cease at the death of the payee. The Supreme Court of Ohio, in the case of State ex rel. Mundling v. Industrial Commission, 92 Ohio St. 431, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162, held the award for a fixed sum payable weekly for six years to a dependent employee vested in the dependent when the award

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was made, and at the death of such dependent her personal representative was entitled to the balance remaining unpaid. The award under that act has the essentials of a judgment, and appears to be made to the dependent in lieu of damages sustained by reason of the death of the employee. By virtue of our constitutional provisions the amount of recovery for a like cause of action in this state cannot be limited by statute, and the award made by the Industrial Commission under our act does not possess the essentials of a judgment. Under the continuing jurisdiction of the Commission to modify or change the award, it cannot be said to have a fixed determination or a definite amount to be paid for a fixed number of weeks. Our statute (section 5123, R. L. 1910) defines a judgment to be a final determination of the rights of the parties in an action. "An action" is defined in section 4644 of this statute to be an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Section 4645 of the statute provides that every other remedy is a special proceeding. Special proceedings are not within the scope of the usual statutory provisions providing for the survival of actions, and such proceedings, unless especially saved by a statute, abate on the death of the party. 1 C. J. p. 213.

Awards under our act lack another essential characteristic of a judgment. In event of refusal to make payment under the award, the Industrial Commission cannot enforce the payment by execution or order. Section 16 of article 2 of the act provides that the award shall constitute a liquidated claim for damages which may be recovered in an action instituted by the Commission.

The Supreme Court of New Jersey in Erie R. Co. v. Callaway, 102 Atl. 6, held that where one secured a determination and award for permanent disability, and died before the lapse of the maximum number of weeks for which the statute authorized compensation, the right to compensation ceased with his death. In that case it is pointed out that the act provides for compensation during the period of disability, not, however, beyond 400 weeks, and under this provision it was held the Legislature clearly contemplated that disability might not last 400 weeks. The employee there died from natural causes, and attention was called to the fact that the act contained no provision for a case where the employee died from a cause other than the accident during the period of payment for permanent injury. The conclusion was reached that the continuation of the payments after the death of the employee was not intended and was not within the purpose of the act.

Our statute provides that in case of total disability, adjudged to be permanent, 50 per centum of the average weekly wage shall be paid to the employee "during the continuance of such disability, not exceeding 500 weeks," and, like the New Jersey act, makes no provision for payment of the award in the event of the death of the employee.

The Massachusetts act provides for payment to the dependent of an employee killed in the service. In the case of In re Murphy, 224 Mass. 592, 113 N. E. 283, the Supreme Court of that state held these payments came to an end at the death of the dependent to whom the award was to be paid. The award was held not to be a vested right in the dependent passing to his personal representatives or next of kin. The act was held to apply only to the persons mentioned in the act.

In the case of Wozneak v. Buffalo Gas Co., 175 App. Div. 268, 161 N. Y. Supp. 675, the New York court held that the award made to the employee did not give such employee a vested interest in the payments not due, and that the right to such payments did not survive the employee's death and become a part of his estate. The purpose of that act was held to be for the protection of the employee and the persons mentioned by the terms of the act.

By the plain and unequivocal language of section 1, art. 6, of our act,

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no cause of action arising from injuries resulting in death is affected by any provision of the act. Making the award prior to the death of the injured employee is not sufficient to make the various provisions of the act applicable to such injuries after death ensues. The jurisdiction of the Industrial Commission depends upon the terms of the act, and, having lost jurisdiction by the death of the employee, it follows that this court loses jurisdiction of the appeal.

Therefore the motion to dismiss the action must be sustained.

All the Justices concur, except Kane, J., who dissents, and Turner, J., not participating.

SUPREME COURT OF PENNSYLVANIA.

WISE

v.

BOROUGH OF CAMBRIDGE SPRINGS.*

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL FROM DECISION OF REFEREE—JURISDICTION OF WORKMEN'S COMPENSATION BOARD.

Under Workmen's Compensation Act, § 419, permitting an appeal from referee's decision to Workmen's Compensation Board only when taken within 10 days after notice of referee's action has been served on parties, the board, where an appeal has not been taken within such time cannot allow an appeal nunc pro tunc as of a time prior thereto.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL FROM REFEREE—REVIEW.

If Workmen's Compensation Board improperly allows appeal from decision of referee, and affirms decision, Common Pleas Court has no jurisdiction upon appeal to reverse referee's decision and dismiss claim.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from Court of Common Pleas, Crawford County.

Proceeding by Elizabeth Wise against the Borough of Cambridge Springs, brought before the Workmen's Compensation Board, which, on appeal by the United States Fidelity & Guaranty Company, insurer, affirmed the referee's award to claimant. From an order of the common pleas, reversing the decision of the board and dismissing the claim, claimant appeals. Appeal sustained, and award of referee affirmed.

Argued before Brown, C. J., and Mestrezat, Potter, Stewart, Moschzisker, Frazer, and Walling, JJ.

Frank J. Thomas and John A. Northam, both of Meadville, for appellant.

J. Roy Dickie, of Pittsburgh, Albert L. Thomas, of Meadville, and Wm. W. Wishart, of Pittsburgh, for appellee.

BROWN, C. In 1916 Roy Wise a sepcial policeman in the service of the borough of Cambridge Springs, this state. On September 21st of

* Decision rendered, July 17, 1918. 104 Atl. Rep. 863.

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that year an automobile filled with passengers was stalled on a railroad crossing over one of the streets of the borough, and, in attempting to push it off, he was struck by a train, sustaining injuries which resulted in his death. His widow filed a claim against the borough before the Workmen's Compensation Board, and a referee awarded her $2,017.30. An appeal was taken from this to the board by the United States Fidelity & Guaranty Company, the insurance carrier, and the award of the referee was affirmed. From the action of the board the insurance carrier and the borough appealed to the court below, which set aside the award to the widow, on the ground that her husband was not an "employee" of the borough within the meaning of the Workmen's Compensation Act. On her appeal from the action of the court below disallowing her claim, she assigns several reasons for reversal, but only one need be considered, as it is conclusive of her right to have the award of the referee sustaned.

[1-3] The right of appeal to the compensation board from an award or disallowance of compensation by a referee is given by section 419 of the Workmen's Compensation Act of June 2, 1915 (P. L. 736). If not so allowed it would not exist, and it is permitted only if taken "within ten days after notice" of the referee's action. In this proceeding the borough of Cambridge Springs and the United States Fidelity & Guaranty Company both appeared by their attorneys before the referee in opposition to the claim of the appellant. On December 6, 1916, he filed his award. On the 30th of the same month—24 days thereafter—the appeal was taken from it by the insurance carrier to the Compensation Board. On January 24, 1917, when the case was called for hearing before that board, this appellant moved that the appeal be stricken off, because it had not been taken within the time prescribed by the statute. This motion was refused by the board in an opinion filed on the 21st of the following March, the reason assigned for its action being that it had been "liberal in allowing appeals nunc pro tunc when it appears that one of the parties in interest has not had full notice of the findings and award of the referee." It is to be noted that the allowance of an appeal from the action of a referee is not one of the functions of the board. It has nothing to do with the allowance of an appeal, which is a matter of right under the statute, if taken in accordance with its provisions. All the board has to do with it is to pass upon it when properly taken. If the board can allow an appeal nunc pro tunc, there would be no limit to the time within which an appeal could be taken, though the act of assembly expressly limits it.

The right of the insurance carrier to appeal after the statutory period had expired was challenged by the widow of the deceased at the very threshold of the proceeding before the compensation board, and even if the board could have allowed the appeal nunc pro tunc, it ought not to have done so in view of the testimony taken before it on the motion to strike off. J. A. Boland, the solicitor of the borough of Cambridge Springs, testified that he had had charge of the proceedings on behalf of the borough;, that at the hearing before the referee, E. J. Stetson, a local attorney, appeared for the United States Fidelity & Guaranty Company, the insurance carrier, and conducted the proceeding for it; that on December 12, 1916, he and the attorney for the insurance carrier received the findings of the referee, and on the 13th or 14th of the same month the said E. J. Stetson came to his office, when he handed him the finding in the matter; that after examining it Stetson handed it back to him; that Stetson, being attorney of record in the case, he considered the notice of the award was properly served on him; that Stetson read the award over, and that they discussed the advisability of taking an appeal or any further action in the case. Here is a distinct statement by the borough solicitor, not questioned by the attorney for the insurance carrier, that it had notice through him of the award more than 15 days before its appeal was taken, and as it was too late to be of any avail the Compensation Board was powerless to recognize it.

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"Where a statute fixes the time within which an act must be done, as, for example, an appeal taken, courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent, an allowance of the act nunc pro tunc." Schrenkeisent et al. v. Kishbaugh, Coslett et al., 162 Pa. 45, 29 Atl. 284.

In Singer v. Delaware, Lackawanna & Western Railroad Co., 254 Pa. 502, 98 Atl. 1059, the court allowed an appeal from the report of a board of viewers in condemnation proceedings more than thirty days after it had been filed. A motion by the railroad company to strike it off was refused, and an issue framed, which resulted in a verdict for the plaintiff in three times the sum awarded her by the viewers. On appeal from the judgment entered on the verdict the sole question was as to the power of the court to allow the appeal from the report of viewers more than thirty days after it had been filed. In holding that it possessed no such power, we said, in reversing the judgment in favor of the plaintiff:

"Act April 9, 1856 (P. L. 288), § 3, provides that, 'upon the report of said viewers, or any four of them, being filed in said court, either party, within thirty days thereafter, may file his, her or their appeal from said report to the said court.' In the present case the 30 days expired on October 17, 1913, while the appeal was not taken until November 8th. In Harris v. Mercur, 202 Pa. 313, this court, speaking by Mr. Justice Mestrezat, said (page 317 [51 Atl. 969,]): If we are correct in holding that the act of April 22, 1874 (P. L. 109), required the appellant to file his exceptions within 30 days after he had received notice of the filing of the court's decision, the order of the court below in permitting exceptions to be filed thereafter was without authority and hence without effect or validity. The commands of a statute cannot be waived or dispensed with by a court. They require implicit obedience as well from the court as from its suitors: Jackson ex dem. Bleecker v. Wiseburn, 5 Wend. (N. Y.) 136. "It has been repeatedly held," says Mr. Sedgwick (Construction of Statutory and Consitutional Law, 277, 2d Ed.) "that courts have no dispensing power, even in matters of practice, when the Legislature has spoken. Thus, where a statute declares that a judge at chambers may direct a trial if application is made within ten days after judgment, it has been said that 'he can no more enlarge the time than he can legislate in any other matter.' When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice.' Under the act of 1856, the period of 30 days allowed for taking an appeal from an award of viewers runs from the date of the filing of the report, not from its confirmation. Gwinner v. Lehigh & Del. Water Gap R. R. Co., 55 Pa. 126. Where a party has been prevented from appealing by fraud, or by the wrongful or negligent act of a court official, it has been held that the court has power to extend the time for taking an appeal. Zeigler's Petition, 207 Pa. 131 [56 Atl. 419]; York County v. Thompson, 212 Pa. 561 [61 Atl. 1024]. But where no fraud or anything equivalent thereto is shown such appeals cannot be allowed. Dunmore Borough School District v. Wahlers, 28 Pa. Super. Ct. 35; Guyer v. Bedford County, 49 Pa. Super. Ct. 60. The mistake or neglect of the attorney for the party desiring to appeal is not sufficient ground for relief: Ward v. Letzkus, 152 Pa. 318, 319 [25 Atl. 778]."

[4] From the time this appellant protested in limine before the Compensation Board that the appeal from the award of the referee had been taken too late, it was prosecuted with due notice of its invalidity, and if that board had no jurisdiction of it—and it certainly had not—the court below had none on appeal from its action.

For the reason stated, this appeal is sustained, and the award of the referee affirmed.

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SUPREME COURT OF WASHINGTON.

NELSON

v.

INDUSTRIAL INSURANCE DEPARTMENT. (No. 14543.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—SUFFICIENCY.

In a proceeding for compensation under Workmen's Compensation Act, evidence *held* to sustain a judgment that the loss of eyesight was caused by the accident complained of, and not by a pre-existing diseased condition.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—FEES OF EXPERT WITNESSES.

In a proceeding under Workmen's Compensation Act, the allowance of $45 to an expert medical witness was not justified under Rem. Code 1915, § 6604—20, authorizing the court to allow fees of medical and other witnesses out of the administration fund.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Department 2. Appeal from Superior Court, Clarke County; R. H. Bach, Judge.

Proceedings under the Workmen's Compensation Act (Laws 1911, p. 345) by N. E. Nelson. From an order of the Industrial Insurance Department, granting an award as for permanent partial disability, the Insurance Department appeals. Modified and affirmed.

W. V. Tanner, of Olympia, and Howard Waterman, for appellant.
Henry Crass, of Vancouver, for respondent.

CHADWICK, J. This case comes to us on appeal from a judgment of the superior court overruling an order of the Industrial Insurance Department, granting respondent an allowance for permanent partial disability.

Respondent was injured in an accident on a logging railroad. He claims the loss of the sight of one eye. The court made findings as follows:

"That prior to the accident plaintiff's eyesight was good, and he was not afflicted with optic atrophy.

"That at the time of the injury plaintiff complained of severe pain in his head over the left eye, which pains continued for some time, and to a certain degree up to the time of the trial.

"That shortly after the injury, the sight of the left eye began to fail and decrease rapidly, and at the time of the trial plaintiff was practically blind in the left eye.

"That shortly before the accident plaintiff could use one eye as well as the other, and there was no difference in the sight of either.

"That as a result of the injury, plaintiff has sustained the practical total loss of vision in the left eye."

The physicians called in behalf of the department testify positively that the loss of the sight of respondent's eye could not have resulted from

* Decision rendered, Nov. 20, 1918. 176 Pac. Rep. 15.

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the injury received in the accident; that respondent is suffering from a primary optic atrophy; that primary atrophy is not due to inflammatory processes, nor is it the result of an injury; that if there has been an atrophy of the optic nerve due to such causes it is called secondary atrophy; that it is likely that respondent, being afflicted with true or primary optic atrophy was not aware of his condition, which must have existed for some time before the accident although not discovered until after he had been injured. On the other hand, professional men testifying on behalf of respondent advance the opinion that there may have been some injury of the optic nerve; that it is almost impossible to make a positive diagnosis in a case like this; that no one can say definitely whether an atrophy of the optic nerve is prmary or secondary, without considering the history of the case, and that there is no specific rule to positively determine what has caused the condition. One of the doctors suggests that the learned discourse about primary and secondary atrophy is "dictionary definition pure and simple," and that the term "primary atrophy" is often used for convenience to cover ignorance of the true causes. The doctors, as is sometimes the case, have disagreed. Their opinions cannot be reconciled. The testimony of the respondent is that he was a carpenter by trade, that up to the time of the accident he used either eye as convenience dictated, and that there had been no trouble with or diminution of his vision. A neighbor testified that about a year before the accident he was with respondent when he was shooting hogs and that he could shoot from one shoulder as well as the other, and that he never complained about his eyesight.

[1] One of the first inquiries made by oculists in cases of atrophy of the optic nerve is whether the patient has ever been afflicted with lues or any germ-carrying disease. There is no evidence that respondent was ever so afflicted. He denies that he was ever the victim of any such condition. These physical facts, coupled with the opinion of reputable oculists that the condition may have resulted from the accident is enough to sustain the judgment of the court below.

[2] The trial judge allowed a fee of $45 to one of the medical witnesses who came from Portland, Or., to attend the trial. It is the contention of respondent that this allowance is proper under Rem. Code, § 6604—20, which provides that the court may allow an attorney's fee, "and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation."

There is no provision of the law that will warrant the payment of extraordinary fees to expert witnesses as such. It was formerly provided in section 25 of the original act of 1911 (Laws 1911, p. 371) that—

"Upon the appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make to the court their report thereon, and they may be interrogated before the court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court but shall not exceed ten dollars per day each."

This section was expressly repealed by section 10, c. 188, Laws 1915, at which session of the Legislature it was provided "that fees of medical and other witnesses and the costs shall be payable out of the administration fund."

We think it is hardly within any rule of statutory construction to say that it was the intention of the Legislature to leave the fixing of witness fees to the discretion of the court.

"At common law costs were not recoverable eo nomine. * * * Costs can therefore be recovered only in cases where there is statutory authority therefor." 15 C. J. 21.

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"It is settled in this state that costs are purely statutory, and can only be awarded when the statute gives them." Eggerth v. Spokane, 91 Wash. 221, 157 Pac. 859.

[3] Being dependent upon the statute, costs and witness fees are never to be allowed in the discretion of the trial judge, in the absence of a positive or permissive statute. In re Queen, 82 N. J. Eq. 588, 89 Atl. 860; Struthers v. Christal, 3 Daly, 327; Wallace v. Sheldon et al., 56 Neb. 55, 76 N. W. 418. So it is held that—

"Sums paid for compensation of expert witnesses beyond ordinary fess authorized by statute for witnesses generally are not taxable as costs." 15 C. J. 131; 5 Standard Encl. Proc. 951.

It will be observed that the only discretion given to the court in the allowance of costs on appeal from an order of the department, is that the trial judge may fix a resonable attorney's fee and "such [reasonable] fee, and the fees of medical and other witnesses * * * shall be payable" etc., plainly indicating that it was the intent of the Legislature to associate medical witnesses with "other witnesses" and not with the attorney whose service is independent of the witnesses, and for which no fee is provided by law.

We have heretofore refused to extend the terms of this statute by construction. O'Brien v. Industrial Insurance Department, 171 Pac. 1018.

It follows that the judgment of the lower court should be modified to this extent. In all other respects it is affirmed.

Main, C. J., and Holcomb, Mount, and Mackintosh, JJ., concur.

SUPREME COURT OF WASHINGTON.

SPOKANE & I. E. RY. CO. ET AL.

v.

WILSON ET AL., INDUSTRIAL INSURANCE COMMISSION.

(Nos. 14667, 14870, 14871.)*

MASTER AND SERVANT—STATUTES—CONSTRUCTION—EMPLOYEES ENGAGED IN INTERSTATE COMMERCE.

Under Workmen's Compensation Act, § 18, as amended by Laws 1917, p. 96, exempting railroads which do an interstate business, employee of railroad doing interstate business, though the bulk of its business is intrastate, is not entitled to compensation, but can recover only in accordance with the latter part of the above amendment, which enacts within the state the provisions of the federal Employers' Liability Act.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

Tolman and Fullerton, JJ., dissenting.

En Banc.

Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Three actions by the Spokane & Inland Empire Railway Company, by the Yakima Valley Transportation Company, and by the Washington Water Power Company, against John M. Wilson and others, as the

* Decision rendered, Nov. 19, 1918. 176 Pac. Rep. 34.

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Industrial Insurance Commission. From the judgment rendered, plaintiffs appeal. Decree directed for plaintiffs.

Richard & Fontaine, of North, Yakima, and Post, Russell, Carey & Higgins and Graves, Kizer & Graves, all of Spokane, for appellants.

W. V. Tanner, of Olympia, and John A. Homer, of Seattle, for respondents.

MAIN, C. J. These three actions against the Industrial Insurance Commission, where the appellants seek to be excluded from the operation of the Workmen's Compensation Act (Laws 1911, p. 345), all call for the interpretation of the amendment to section 18 thereof contained in Session Laws 1917, p. 96, which reads as follows:

"Inasmuch as it has proved impossible in the case of employees engaged in maintenance and operation of railways doing interstate, foreign and interstate commerce, and in maintenance and construction of their equipment, to separate and distinguish the connection of such employees with interstate or foreign commerce from their connection with intrastate commerce, and such employees have, in fact, received no compensation under this act, the provisions of this act shall not apply to work performed in the maintenance and operation of such railroads or performed in the maintenance or construction of their equipment, or to the employees engaged therein, but nothing herein shall be construed as excluding from the operation of this act railroad construction work, or the employees engaged thereon: Provided, however, that common carriers by railroad engaged in such interstate or foreign commerce and in intrastate commerce shall, in all cases where liability does not exist under the laws of the United States, be liable in damages to any person suffering injury while employed by such carrier, or in case of the death of such employee to his surviving wife and child or children, * * * then to the parents, sisters, or minor brothers, residents of the United States at the time of such death and who were dependent upon such deceased for support, to the same extent and subject to the same limitations as the liability now existing or hereafter created, by the laws of the United States governing recoveries by railroad employees injured while engaged in interstate commerce."

1. The Spokane & Inland Empire Railway Company operates an electric system of railways consisting of street car lines in Spokane and suburban and interurban lines into Spokane, two of the interurban lines extending into the state of Idaho. The company also operates an electric power plant on the Spokane river. All of these operations are under one control and are conducted as a whole. The interurban railway lines constitute the greater portion of the company's business. The number of employees on the interurban and street car lines cannot be segregated, since the street car lines are combined with suburban lines in so far as the operation of cars, the repair shops, and the care of tracks are concerned. The power generated by the power department is used principally for railroad purposes, from 15 per cent. to 25 per cent. being sold commercially. The power sold is what is known as "surplus" power, which is available only when the river is at its higher stages. There is no segregation of expenses in the power department between that required to generate the power used for railroad purposes and that sold commercially, nor is there any segregation possible with respect to the power used for the movement of interstate and intrastate traffic. The urban cars carry no interstate traffic, but interstate trains run and interstate traffic is carried over all portions of the street car lines.

2. The Washington Water Power Company operates an electric car system in and about the city of Spokane, which system consists of twenty routes, all of them except one being operated exclusively for the carrying

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of passengers in and about the city of Spokane. On one line operating principally for the carriage of passengers wholly within this state, the cars carry mail coming from and destined to points outside of the state. In addition to the urban routes, the company operates two branch interurban railways extending from Spokane to Cheney wholly within the state. This interurban line is used in addition to carrying interstate passengers and freight in carrying express, freight, and mail, some of which is transported in continuous passage between points on the interurban line and points in other states, the tracks being physically connected with the tracks of the Northern Pacific Railway, the Great Northern Railway, the Spokane, etc., Ry., the Ohio River & Western Railway, and the Chicago, Milwaukee & St. Paul Railway, so that it is possible to interchange cars between the interurban tracks and the tracks of these connecting interstate carriers. The tracks of the interurban line are also physically connected with the plaintiffs' urban tracks in the city of Spokane, and cars operated in the interurban service use many of the urban tracks within the city. The company also operates electric power plants located on the Spokane river, in the state of Idaho, and at Spokane, Long Lake, and Little Falls, in the state of Washington. The power generated is used in the operation of the urban car system, in the operation of the interurban lines, furnishing light to the city of Spokane, and for supplying numerous cities and towns in Washington and Idaho with power and light, and for general commercial purposes. The entire business is conducted under one management, and to separate and distinguish the employees engaged in interstate commerce from those engaged in intrastate commerce would be nearly impossible.

3. The Yakima Valley Transportation Company operates an urban and interurban railroad system in and about the city of Yakima. The tracks of the company are physically connected with the Ohio River & Western and the Northern Pacific Railways tracks, and receive from those interstate carriers freight in carload lots; 90 per cent of the freight handled by the company being interstate business. One system of tracks is used for both urban and interurban service, and cars engaged in carrying city passengers and transporting interstate passengers and cars transporting freight, mail, and express in interstate commerce pass over the tracks alternately one with the other. Freight is received at all points on the company's line, and through bills of lading are issued to all points in the United States and Canada. Freight is billed from points outside of the state to points on the company's lines and received and delivered at its stations on through bills of lading. The same employees are engaged in maintaining the tracks used in all service performed by the company; the car shops and car barns are used in both classes of service; the same men working on the equipment used in interstate and intrastate business. The executive officers and office employees perform services without regard to whether the business they are engaged upon is interstate or intrastate. The operators of the cars are engaged part of the time on one class and part of the time on the other class of service.

When the Workmen's Compensation Act was passed in 1911, it was anticipated that there had been substituted for the common-law liability of employers a sure and certain compensation for all railroad employees except those who come within the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]). Under the operation of the law, however, it became apparent that, as stated in the amendment of 1917, a great deal of confusion arose in cases of employees engaged upon railroads doing both interstate and intrastate business. From the statement of the business engaged in by the three companies involved in these suits, it is apparent that great numbers of employees are engaged in work so impossible of segregation, as to whether it is at any given time interstate or intrastate, that the question of whether they came within the state law or the federal law is im-

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possible of determination. In attempting to remedy this situation, and at the same time not to remit employees to the uncertainty of the common-law liability, the amendment of 1917 was enacted, and, as we view it, that act, instead of attempting to segregate employees into two classes—those engaged in interstate and those engaged in intrastate work—the Legislature, in effect, said that it matters not whether the employees are engaged in interstate or intrastate work so long as the company for which they were working was a railroad actually engaged to some extent in doing an interstate, foreign, or intrastate commerce. In other words, the character of the business of the railroad company determines the status of the employees, and if a portion of the railroad company's business is interstate the employees engaged in its maintenance and operation, or in the maintenance and construction of its equipment, should not come within the operation of the state law, but that all such employees could recover in the state courts, not under the common-law liability, but under the liability imposed under the amendment which is the same liability fixed by the United States in the federal Employers' Liability Act. To give this amendment any other construction would be to read something into it which it does not contain, and to attempt to construe it with reference to the proportion of the company's business which may be interstate, and apply the amended act only to such companies whose interstate business bears a certain proportion to their entire business, is not only rewriting the amendment, but also perpetuating and increasing the confusion which the amendment recognized and sought to obviate. Under this interpretation of the act, the employee is the beneficiary of a clear definition of his status; for, if his employer is a railroad company a portion of whose business is interstate, he knows, by reason of that fact, that his remedy for an injury received is not compensation under the Workmen's Compensation Act, but that he has the same protection in the state courts which the federal act gives to employees of interstate railroad companies.

We see no merit in the contention that, because a railroad company is principally engaged in intrastate activity, its employees should receive the benefits of the Workmen's Compensation Act. The certainty and uniformity which the original act sought to provide is furnished by the amendment which by classifying employers, makes certain to the employee his status and determines the law under which he will receive compensation. To interpret this amendment in any other way would, to our mind, lead to confusion worse confounded. In place of the uncertainty and practical impossibility of determining whether employees should be classified as being engaged in interstate and intrastate work, the amendment gives all the employees in maintenance and operation and maintenance and construction of equipment of a railroad actually doing an interstate business as a portion of its general railroad business, the benefit of the same rules of liability provided by the federal government in cases against interstate carriers.

The action of the lower court in denying the relief sought was erroneous. A decree will be entered that appellants are not amenable to the jurisdiction of the Industrial Insurance Commission, and restraining that commission from making any demand upon appellants for premiums under the Workmen's Compensation Act for its employees engaged in maintenance and operation or in maintenance and construction of equipment.

Chadwick, Holcomb, Mount, Parker, and Mackintosh, JJ., concur.

Tolman and Fulerton, JJ., dissent.

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SUPREME COURT OF APPEALS OF WEST VIRGINIA.

SUTTLE

v.

HOPE NATURAL GAS CO. (No. 3534.)*

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYEES ENGAGED IN INTRASTATE COMMERCE —CONSTRUCTION OF ACT.

With respect to an employer engaged in interstate commerce, section 52 of the Workmen's Compensation Act (chapter 15P, Code [sec. 708]) applies the provisions of the act unconditionally to those of his employees whose work is wholly intrastate and clearly separable and distinguishable from work in interstate commerce, though the same section, with respect to employees who are engaged partly in intrastate and partly in interstate commerce, provides that the act shall apply only upon the condition that the employer and such employees volutarily accept the provisions of the act by formal writing approved by the commissioner.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

Error to Circuit Court, Harrison County.

Action by J. Addison Suttle, administrator, etc., against the Hope Natural Gas Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

A. B. Fleming, Charles Powell, and Kemble White, all of Fairmont, for plaintiff in error.

Steptoe & Johnson, of Clarksburg, for defendant in error.

LYNCH, J. Plaintiff's intestate, his son, nearly 16 years old, was killed by the fall of a three-pole derrick which he and other employees of the defendant were engaged at the time in erecting preparatory to and necessary for the cleaning of a gas well to accelerate its production. The derrick was formed while on or near the ground out of three stems of 6-inch pipe, 40 to 50 feet long, bound together at one end, the other ends of two of them being placed or chained at or near the sockets prepared to receive them when hoisted into the proper position, and cut in the sills supporting the platform around the well, the third stem extending out in the opposite direction like the lower part of the letter Y, and being the last one to reach and enter the socket, likewise prepared, the sockets being equally distant from each other, estimated to be from 15 to 18 feet, and, as thus formed, bound, placed, and chained, the apparatus was raised into position by means of the team of horses driven by the decedent, hitched to a line connected with one or more pulleys and fastened to the third stem. When it was raised almost to the position desired, defendant's foreman, Bramer, ordered Suttle to disconnect the team, return it to the derrick, and reconnect with the line a second time, the better to complete the hoisting process. This order the deceased obeyed, and drove the team within the triangle formed by the three stems, and with the assistance of an employee had almost completed what he was told to do, during which time Bramer was engaged in "pinching" one of the stems into its socket, when the derrick fell and caused the death of the decedent, while trying to escape

* Decision rendered, Oct. 22, 1918. Rehearing denied, Nov. 16, 1918. 97 S. E. Rep. 429. Syllabus by the Court.

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the falling stems, but did not injure the horses, though still within the triangular space.

The declaration avers three different causes of action in nine counts, to each of which and to the declaration as a whole defendant at the May, 1917, term demurred. The causes are the failure (1) to provide a reasonably safe place and appliances in and with which to work; (2) to warn and instruct; (3) to promulgate and enforce proper rules and regulations. At the September term the court overruled the demurrer, and, as appears from the order, plaintiff thereupon amended the pleading by adding to each count an averment of his appointment and qualification as personal representative, and later moved for an order to require defendant to plead to the amended declaration on or before October 2d, that date being within the term. On that day defendant appeared specially and entered its protest and objection to the enforcement of the requirement to plead, basing its argument upon the ground that, as it had demurred, plaintiff could not within that term amend and compel an issue upon the pleading, except upon the notice required by section 12, c. 125, Code (sec. 4766) and that no such notice was given. The objection being overruled, defendant pleaded the general issue.

[1] Defendant was present in court by counsel when the demurrer was overruled and the declaration amended, and therefore was advised of the action taken. Besides, the statute cited requires notice only where a demurrer is sustained, not when it is overruled. But defendant contends that, though the order "doth now overrule the said demurrer," yet in the next line it shows a confession of insufficiency by permitting plaintiff to amend by averring his appointment and qualification, as required in Austin v. Calloway, 73 W Va. 231, 80 S. E. 361, Ann. Cas. 1916E, 112, and that therefore there can be no difference in plaintiff's position, where he confesses the demurrer to be good and moves to amend, and where the court holds the demurrer to be good, necessitating amendment. In other words, defendant contends that a voluntary amendment after demurrer overruled is the same as a demurrer sustained. There is a substantial difference, we think, between voluntarily amending a pleading and being compelled to do so on penalty of dismissal with costs, after the court has adjudged it to be materially defective. There is greater need for the formal notice in the latter case, since the demurrant has been lulled into a sense of security by the sustaining of his challenge to the declaration. Furthermore, defendant seems not to have been prejudiced by the action taken, because he was present in court by counsel at the time the amendment was offered and interposed no objection then for want of formal notice.

Nor did the court err in overruling defendant's motion for a continuance based upon the absence of Cain, one of the eyewitnesses of the accident, then in the service of the United States. Defendant introduced only two witnesses, Cooper and Quay, the purport and effect of whose testimony was to show the interstate character of the business in which defendant was engaged at the time of the injury, from which it was argued that defendant's failure to pay premiums into the state compensation fund did not deprive it of the common-law defenses. It did not call to the stand Bramer, its foreman in charge of the work, and present at the time the injury was inflicted. With the exception of Bramer and Cain, the employees witnessing the accident were called by the plaintiff to testify in his behalf and subjected to cross-examination by the defendant's counsel.

[2, 3] The next ground relied on for reversal goes to the exclusion of the testimony introduced to establish the general intrastate and interstate character of defendant's business and of the work being done when the derrick fell. Thus the gas from the well, it appears, had, immediately preceding the attempt to clean the well, been transported and delivered through trunk pipe lines, with which feed lines from the well were connected, beyond the state line into Ohio, and there sold, together with like production from other wells controlled and operated by defendant, to

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another company for distribution to its patrons and consumers in that state, and to the Manufacturers' Light & Heat Company, at or near Sedalia in this state, and thence by it transported to Pennsylvania and Ohio for like sale and distirbution to his patrons and consumers. Apparently natural gas is a commodity, as much so as coal, fruits, or lumber, and when transported through conduits to market becomes the subject of intrastate commerce, accordingly as the transportation between the place of production and distribution and sale is in different states or in the same state. Just as coal, it is a fuel, and as such is used for domestic or industrial purposes. It is a substance marketable, either within the state wherein it is produced or in the state to which it is transported and sold.

The ultimate object and purpose of the excluded proof was, as indeed is conceded, to bring the case within the terms of section 52 of the Workmen's Compensation Act (chapter 15P, Code [sec. 708]), in order to meet the averment of one count of the declaration regarding defendant's failure to put itself within the protection of the act by compliance with its general provisions, which section as respects certain work relieves an employer from the unconditional requirement of compliance, so as not to exclude the right to rely on the common-law defenses of fellow servancy, assumption of risk, and contributory negligence.

It is unnecessary to decide, and we do not decide, whether defendant is engaged in interstate commerce or not. If it is not, clearly section 52 does not apply, and the act requires unconditional compliance with its terms. But assuming—only for the purpose of this decision, however—that defendant is engaged in interstate commerce, if the general work of plaintiff's intestate and his duties at the time of the injury within the state, and "clearly separable and distinguishable from interstate commerce work," the act applies unconditionally.

Section 52 was enacted to prevent conflict with the federal power over interstate commerce, and to bring within the protection of the act only such employees as to whom the state could legislate without violating congressional enactments under the commerce clause of the federal Constitution. Where the employees of an interstate carrier are concerned, the power of the state over such employees stands thus: (1) As to work done in intrastate commerce, the state has full and exclusive primary power. The first Employers' Liability Act was held unconstitutional, because extended to cover *all* work done by employees of an interstate carrier, a large part of which work could not be upon interstate commerce or directly in furtherance thereof. First Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. The present liability act eliminated that difficulty, and was held constitutional in Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. (2) As to their work upon interstate commerce, when Congress has prescribed a method of compensation, the state has no power. New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; Erie R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. (3) As to their work done upon interstate commerce, where Congress has not prescribed a method of compensation, the state can exercise a limited right of regulation until Congress has legislated upon the subject. Thus while Congress cannot, under any circumstances, if it desired, invade the state's region of control, the state can cover the field belonging to Congress until the federal power has actually been exercised. Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Valley Steamship Co. v. Wattawa, 244 U. S. 202, 37 Sup. Ct. 523, 61 L. Ed. 1084. As yet Congress has not chosen to exert its power over interstate carriers of natural or artificial gas, for the Interstate Commerce Act (8 U. S. Comp. Stat. 1916, § 8563, p. 9053) expressly excludes them from its terms, and the present Employers'

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Liability Act (8 U. S. Comp. Stat. 1916, § 8657, p. 9388) applies only to employees of interstate carriers by railroad

In addition to the constitutional obstruction where the employer is engaged in whole or in part in interstate work, the farmers of our Compensation Act were confronted with the practical difficulty of applying it to employees of such employer, who may, with reference to the work being done, be divided into three classes: (1) Those working wholly upon intrastate commerce, or business that is clearly distinguishable and separable from the interstate work. (2) Those working wholly upon interstate commerce. (3) Those working partly upon intrastate and partly upon interstate commerce. As to the first two, no difficulty appears, for one field belongs exclusively to the state, the other primarily to Congress, and the employees of each could readily be ascertained and classified. As to the third class, however, an apparent difficulty arose, Congress could not provide for them, except as to their interstate work, and has not provided for them to any extent, except as to employees of carriers by railroad. But the state under its primary power could cover all intrastate work, and under its permissive power could provide for all interstate work not covered by federal legislation.

To meet this situation section 52 was enacted. The general scope of the act is disclosed in section 9, chapter 15P (sec. 665), to embrace:

"All persons, firms, associations and corporations regularly employing other persons for profit, or for the purpose of carrying on any form of industry or business in this state."

Employees are defined as:

"All persons in the service of employers, as herein defined, and employed by them for the purpose of carrying on the industry or business in which they are engaged."

Section 52 limits the general scope of the act, and as originally enacted in 1913 was as follows:

"The provisions of this act shall apply to employers and employees engaged in intrastate and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his employees working only in this state may with the approval of the commission, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the commission, and such acceptances, when filed with and approved by the commission, shall subject the acceptors irrevocably to the provisions of the act to all intents and purposes as if they had been originally included in its terms. Payments of premium shall be on the basis of the pay roll of the employees who accept as aforesaid."

This section embraces two parts: The first limited the application of the act, where the employer is engaged in both interstate and intrastate commerce, to cases where, and to the extent that, the intrastate work in which they are engaged is clearly separable and distinguishable from the interstate phase of the employer's business. That is to say, it limits the unconditional application of the act to the first class of employees mentioned above, those working wholly on intrastate commerce, as clearly distinguished from interstate work, and excludes its application to the second class, those working wholly in interstate commerce. The second part of section 52, the exception clause, deals with the third class of employees, those working partly upon interstate and partly upon intrastate commerce. As to them the act applies only conditionally; that is, the employer and such employees must first voluntarily accept the provisions of the act by filing written acceptances with the commission for its

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approval, which it may grant or withhold. Barnett v. Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150.

Though a volutary acceptance of the provisions of the act is necessary before the protection of its terms is available to employees doing both interstate and intrastate commerce, it is not necessary where the employees are engaged in work clearly separable and distinguishable from interstate commerce. Reading section 52 down to the word "except," the effect of the section to that point is to cut down the broad terms of section 9, quoted above, where the employer is engaged in interstate commerce, and to limit the application of the act to such of his employees as are doing work clearly separable from interstate commerce; that is, to limit the act to the first class of employees mentioned above, those engaged wholly in intrastate work. If we stop at that point, classes 2 and 3 are entirely excluded from the benefits of the act. But the clause beginning with the word "except" extends the act to include those in class 3 named above, but makes its application conditional upon their acceptance of its terms. Hence the second part of section 52 does not restrict the first, but, as we have seen, adds to and extends it. Hence the conditional application of the act provided for in the second part of the section does not relate to or cover the first also, but leaves it unconditional. The case of Barnett v. Coal & Coke Ry. Co., supra, though dealing with a situation where the employees were engaged partly in interstate and partly in intrastate commerce, and holding that as to such situation the act applied only conditionally, as we have seen, yet intimated that, if the work had been clearly separable from interstate commerce, the act would have applied unconditionally. The courts of several states, with statutes exactly like or essentially similar to our section 52, as it originally stood, have held that where the work is clearly separable from interstate commerce the act applies unconditionally. State v. Postal Telegraph Cable Co. (Wash.) 172 Pac. 902; Jensen v. So. Pac. Co., 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276 (reversed upon other grounds in 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900); Raymond v. Chi., Mil. & St. Paul Ry. Co., 243 U. S. 43, 45, 37 Sup. Ct. 268, 61 L. Ed. 583; New York Cent. Ry. v. White, 243 U. S. 188, 191, 192, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. Section 52 was amended in 1915, and as amended was in force at the time of the injury to plaintiff's intestate. But its provisions are essentially unaltered, as defendant admits in his brief, and what has been said applies to the section as it now stands.

[4] Hence it becomes necessary to consider whether the work which the deceased was doing was clearly separable and distinguishable from interstate commerce. Until reduced to possession by confinement, natural gas, it is said, though somewhat inaccurately, partakes of the nature of feræ nature. It is not the subject of ownership till brought to the surface and confined, and of course cannot become the subject of interstate commerce till its ownership becomes complete by confinement in the ordinary—indeed, the only competent—mode of transportation, pipe line conduits. The well reaches down to the gas-bearing strata and releases the gas there confined, but, until it reaches the surface and enters the pipe for transmission to the interstate trunk lines, it is not in interstate commerce. The production department of the gas industry is clearly separable from the transporting or marketing branch. All work in connection with the production of gas—that is, with bringing it to the surface where it may be confined and reduced to possession—is local in nature and clearly separable and distinguishable from the marketing or interstate portion of the industry. The work being performed by plaintiff's intestate was confined wholly to the well itself, and was separable from the transportation phase of the business; nor was his work on other occasions and at other times such as to bring him within the class of those engaged partly in interstate, partly in intrastate commerce.

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The case of Del., Lack. & West. R. R. Co. v. Yurkonis, 228 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, clearly emphasizes and illustrates the argument addressed to this branch of the case. Instead of being engaged in the development and marketing of gas for profit through trunk pipe lines owned by it and extending into Ohio, the defendant in the case cited owned and operated a railroad and the coal mine in which Yurkonis, a miner, was employed and worked when injured. Reading from the opinion at page 444 of 238 U. S., at page 904 of 35 Sup. Ct. [59 L. Ed. 1397], we find the court saying:

"The mere fact that the coal might be or was intended to be used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce."

Evidently Young Suttle was not performing any work directly in reducing and delivering gas into the pipe line. The derrick was merely an instrumentality later to be employed in cleaning the well of obstructions impeding the operation of another instrumentality, the well itself, also employed to effectuate the ownership of the gas within the land, that the gas might, but had not then, become an article of commerce. This employment is, we think, too remote to be considered as in furtherance of or an element or factor in interstate commerce. Hence we are of the opinion that the Compensation Act applies unconditionally, and that defendant is therefore deprived of his common-law defenses.

Whether, as defendant in error argues, these defensive matters can properly be proved at the trial upon the general issue without a special plea, as intimated in Rhodes v. Coal Co., 79 W. Va. 71, 90 S. E. 796, we need not determine, as what we have said renders a discussion of that question unnecessary. The only question involved as regards the present subject, the dual character of the business conducted by defendant on the date of the accident, is whether he was employed at that time in interstate commerce; that matter being significant only as a basis for the application of the peculiar provisions of section 52, chapter 15P. And since, as appears, defendant's situation rendered these provisions unconditionally operative, the pleadings have ceased to be important.

Finally, we are required to express an opinion upon the appropriateness or propriety of instructions 5 and 6, propounded by plaintiff below and read to the jury over defendant's objection. The only apparent defect, if such it be, pointed out by counsel or discovered by us as to No. 5, goes to what is said to be the equivalent of the expression of judicial opinion to the effect that the negligence of defendant's foreman in attempting to "pinch" one of the three legs of the derrick into its proper position caused the derrick to fall, and therefore was the real or proximate cause of the injury. Whether justly amenable to that criticism, it is nearly so, and perhaps ought not to have been given. Jurors are alert to preceive and often interpret the slightest authoritative intimation of opinion upon the issues they are sworn to try and determine.

[5-8] Instruction No. 6, however, seems to us to be wholly erroneous. It follows:

"The court further instructs the jury that the defendant was bound to adobt, promulgate, and enforce rules reasonably protecting its servants from the dangers of the service arising from neglect of fellow servants or otherwise; and if the jury believe from the evidence that the defendant neglected to adopt, promulgated and enforce such rules, and that the death of Joseph Patrick Suttle was due to such neglect, the defendant is liable in damages therefor."

This instruction relates to the duty averred in the declaration, as to the existence of which much testimony was addressed, but none to its feasibility or adaptability to temporary three-pole derricks, to formulate and promulgate reasonable rules and regulations to govern and control

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the employees of the defendant in the detailed construction of such rigs at gas wells. Though averred in general terms, there is, as we said, no proof in the record tending to show in what respect rules that might be considered reasonable, practicable, and applicable under varying circumstances and conditions surrounding the erection of such instrumentalities could have been formulated and promulgated by defendant. There is, as likewise observed, some proof tending to show want of the publication or posting of such rules and regulations, but none showing the necessity therefor, though it is argued that the necessity is apparent because of the hazard and peril incident to the work in which decedent when killed was engaged. The danger may be apparent with or without rules and regulations. The appearance of the danger may be obvious and patent, yet the rules and regulations may neither remove nor lessen the risk. Labatt does, at section 1115, Master and Servant, state the proposition for which counsel contends, but he adds in the same section what seems to us to be sound law:

"Where the necessity for and practicability of providing rules to meet the given circumstances are apparent from the averments of the complaint and from the testimony by which those averments are supported, the mere fact that neither the pleadings nor the evidence indicate exactly what rules should have been established does not render it a misdirection to charge the jury that the defendant would be liable if he did not establish rules to protect his employees. But in the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be held negligent in not having promulgated them."

Counsel representing the plaintiff at the trial and in this court, conceding the force of this requirement, offered, but was not permitted to introduce, proof tending to show the feasibility of and necessity for the promulgation of rules and regulations applicable to the erection of three-pole derricks, but does not cross-assign that refusal as erroneous. This proof should have been admitted to aid the court and jury trying the case in reaching a just conclusion upon the necessity and availability of the protection likely to be afforded by such rules, if enforced. The rejection or exclusion of testimony offered to show the feasibility of and necessity for the promulgation of rules and regulations for the protection of employees while engaged in the performance of dangerous work is erroneous, and cause for reversal upon the application of the party prejudiced thereby.

We are urged to treat the giving of instruction No. 6 as harmless, first, because the facts proved show the inherently dangerous character of the work done, and justify the verdict and judgment, notwithstanding the instruction; and, second, because, as the error in rejecting or excluding the testimony offered to establish the feasibility of and necessity for the promulgation of rules applicable to the erection of three-pole derricks was induced by defendant, the defendant, not plaintiff, should suffer the consequences of the erroneous ruling. In answer to the first proposition, it suffices to say that for aught we know to the contrary the jury may have based its verdict solely upon the instruction, and concluded that the death of plaintiff's intestate was due to the failure of the defendant to promulgate and publish certain rules and regulations, which it may without any proof whatever have thought would, if promulgated, have saved the life of the decedent. In answer to the second it suffices also to remark that ordinarily a defendant cannot be penalized for exercising his well-recognized right to object to the introduction of any proof which he deems to be without probative force or value upon the trial of the issues joined upon the pleadings, and, if he can, to secure a ruling thereon in his favor. To punish him as suggested, and treat the rejected proof as present in the record, and as having been considered by the jury, when in fact it was not before them for consideration, would deprive him of the right to introduce proof to the contrary, if any be had

But the chief objection to the instruction is its generality. It leaves

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to the jury to prescribe the method which, if prescribed and enforced by defendant according to their conception, would have prevented the accident and saved the life of the deceased. For that reason it falls within the condemnation of Lawrence v. Hyde, 77 W. Va. 639, 645, 88 S. E. 45, 48, wherein the court, speaking through Judge Poffenbarger, says:

"Although no count of the declaration avers failure to adopt and promulgate rules for the regulation of the work and conduct of the men, and there is no proof of lack of rules, an instruction, abstract in form, declaring it to be the duty of an employer to make and enforce reasonable rules for the protection of the servants from unnecessary injury and avoidable danger, and telling the jury to find for the plaintiff, if they should believe such duty had been omitted by the defendant, was given over objection. Lack of averment and proof of failure to prescribe rules precluded right to give this instruction. * * * Moreover, it is entirely too general and indefinite in its terms, if there had been an allegation and proof of non-existence of rules. Under it the jury could have set up duty to make a rule applicable to something only remotely connected with the injury, omission of which would not have constituted proximate cause thereof, and founded their verdict on such omission."

For these reasons, we reverse the judgment, and remand the case for a new trial.

SUPREME COURT OF WISCONSIN.

BEKKEDAL LUMBER CO.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE.

Findings of the Industrial Commission must be supported by evidence, and not based upon mere conjecture.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEATH OF SERVANT—EVIDENCE.

Evidence *held* to sustain finding that the deceased employee died from an accident arising out of and in the course of his employment, and not from injuries intentionally self-inflicted.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceeding by Victoria M. Perry for workmen's compensation for the death of her husband, George S. Perry, opposed by the Bekkedal Lumber Company, employer. The Industrial Commission awarded compensation, and the employer sued to set aside the award. From a judgment sustaining the award, the employer appeals. Affirmed.

George S. Perry, husband of respondent and claimant Victoria M. Perry, was killed December 3, 1915. He was then employed by appellant as foreman in charge of a logging crew, some of whom under his direction

* Decision rendered, Dec. 3, 1918. 169 N. W. Rep. 561.

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were on that day at work constructing a logging road. In such work another employee of appellant, named Boritz, an expert in the use of dynamite, had charge of the work of exploding stumps within such new road and under the supervision of the deceased. Perry had had some former slight experience in handling and knew of the method of the use of such explosive in that kind of work. On the day in question all the men working there, except the deceased, left the place at which the work was being done, for the noon hour. Before leaving Boritz left a small quantity of dynamite and some fuses near a tree just outside of the road, and at some 30 or 40 paces back of the place where the explosive had been used during the forenoon. On the return of the men from dinner they found the body of the deceased lying at the foot of a small tree or sapling in about the center of the road and about 20 feet away from and nearly opposite the tree where the dynamite had been left. He had evidently been instantly killed from the effect of an explosion of dynamite, which caused an injury to the top and front part of his skull and to the thumb and some of the fingers of one hand. Small fragments of the cap which he wore appeared to have been imbedded in the sapling near which his body was found and at a height of about 3 feet from the ground. Some 10 or 12 feet back from the sapling and in the roadway was a stump, which had been partially exploded and portions of which were still to be removed. There was nothing to indicate that any of the necessary preparations had been made by Perry to explode the small tree or sapling near which his body was found, nor anything else in that vicinity, and the testimony indicated that it was neither customary nor necessary to remove such small-sized trees or such partially exploded stumps by the use of explosives. The exploding cap used by Perry must have been obtained by him at some other time than at this noon hour as there were none such left by Boritz with the dynamite and fuse.

The defendant conceded that it did not claim that the facts disclosed as to this death were such that the commission ought to find that the death was by suicide, and the injuries, therefore, intentionally self-inflicted, but insisted that the burden was upon the claimant to show that the accident occurred while performing services in the course of the employment.

The commission found that the deceased, while in the employment of the appellant, sustained a fatal accident from which resulted immediately and while he was engaged in performing services growing out of and incidental to such employment, and in its decision accompanying the award said:

"As indicating accident, it must be kept in mind that the use of dynamite for blasting purposes is attended with real hazard. There was a tree, and one or more scattering stumps, very near the place where the body was found. There was good reason for blowing these out while the men were at dinner, or at least away from premises. This tree and the stumps were quite near the place where the men were grading, while the principal blasting operations were being carried on at the head of the course and away from the major portion of the crew. We think the facts indicate that he remained at the place after the crew went to dinner in order to clear away the tree or stumps, or both, that were soon to interfere with the progress of the grading, and that in pursuing this work he met his death."

The court below, in the action brought to review such finding, sustained the award of the commission, and this appeal was taken from the judgment entered in accordance therewith.

Brown, Pradt & Genrich, of Wausau, for appellant.

Spencer Haven, Atty. Gen., and Winfield W. Gilman, Asst. Att. Gen., for respondents.

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ESCHWEILER, J. (after stating the facts as above). The appellant contends that the facts in the record before the commission were not such as to warrant the inference arrived at by the commission that Perry's death occurred while he was in the performance of his duty and in the master's employment, and that such conclusion must have been based upon mere conjecture, and that therefore the claimant had not met the burden of proof imposed upon her under the law.

It is also contended that there was no evidence showing that there was any reason for blowing up the tree near which Perry was found dead, or that there was any further work of blasting required for the stump, already partly blasted, which was near where his body was found, and that there was no foundation for the suggestion by the commission in their finding that Perry remained at the place after the crew went to dinner in order to clear away the tree or stumps, and that therefore there was a total absence of evidence upon which might be predicated a finding that Perry met his death while within the scope of his employment.

[1] It is undoubtedly the rule of law in this state that findings of the Industrial Commission must be supported by evidence and not based upon mere conjecture. Voelz v. Industrial Com., 161 Wis. 240, 152 N. W. 830.

[2, 3] The situation here was one clearly requiring the commission to apply the well-recognized presumption against suicide in such cases of accidental death. Mil. W. F. Co. v. Industrial Com., 159 Wis. 635, 150 N. W. 998. With that presumption, therefore, and the facts disclosed in the testimony of Perry's employment as foreman in charge of the construction of this road, that explosives were properly used in such work and under his direction, the partially exploded stump left in the road, or even the sapling near which he was found, upon either of which Perry might have been contemplating the use of dynamite, even though such use might not have been in accordance with the customary or economical way of constructing such a road all presented a situation from which the conclusion might have been reasonably and properly drawn that whatever Perry was then doing was within what he then thought was his duty rather than the conclusion that it was an intentionally self-inflicted injury. Within the broad field intended to be covered by our Compensation Act we think the conclusion arrived at by the commission was within their discretion.

The result arrived at in this case is in harmony with such cases as Heileman v. Shaw, 161 Wis. 443, 154 N. W. 631, where the injured body of the brewery workman was found in the building where he was employed with no evidence as to how he met his death; Haller v. Lansing, 195 Mich. 753, 162 N. W. 335, L. R. A. 1917E, 324, where the workman was injured by gasoline explosion in a tool shed where he was lighting his pipe after eating his lunch; State v. District Court, 129 Minn. 176, 151 N. W. 912, where the employee was injured by the explosion of a cartridge shell supposed by him to be empty, and which he was fashioning into a key for his own convenience in doing his work.

We see a substantial difference between the facts in this case and those in the case relied upon by appellant, Savage's Case, 222 Mass. 205, 110 N. E. 283, where a foundry employee was killed on the main track of the railroad eight feet away from the place where he had been at work on a spur track unloading pig iron for the foundry, where no reason was shown for his leaving the place of his employment to go upon the railroad, for here the deceased was on a road which was being constructed under his direction, and where his employment required him to be and while handling material which was used in construction work and under his control.

Judgment affirmed.

Owen, J., took no part.

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SUPREME COURT OF WISCONSIN.

ELLINGSON LUMBER CO. ET AL.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES FOR WHICH COMPENSATION MAY BE GIVEN.

Since under St. 1917, § 2394—3, compensation is given only for such injuries as are incidental to and grow out of the employment, it does not extend to injuries from exposure to hazard which is not peculiar to the industry or substantially increased by the nature of the services.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES FOR WHICH COMPENSATION MAY BE GIVEN.

An injury by freezing is not peculiar to the work of a lumberjack, so that, in the absence of peculiar circumstances, compensation cannot be allowed therefor.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES FOR WHICH COMPENSATION MAY BE GIVEN—"COURSE OF EMPLOYMENT."

Where lumberjack by mistake in orders worked at wrong place and on finding the mistake went to the proper place and worked so much harder than usual in preparing for the next day's drive that his feet perspired and were consequently frozen, he received an injury proximately caused by accident arising out of and in the "course of his employment," within St. 1917, § 2394—3, subd. 3, and was entitled to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 374.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceeding by the Beaulieu for workman's compensation, opposed by the Ellingson Lumber Company, employer. The employer brought suit to set aside an award of the Industrial Commission for claimant. From a judgment of the circuit court affirming the order of the commission, the employer appeals. Affirmed.

Workmen's compensation. This action was begun to set aside an order of the Industrial Commission dated December 1, 1917, awarding to defendant Beaulieu certain compensation on the ground that the finding of the commission that the injuries suffered by the defendant Beaulieu were proximately caused by accident was not supported by the evidence.

The defendant Beaulieu was employed by the plaintiff lumber company as a woodsman, and at the time of his injury was engaged as a swamper and was working about 1¼ miles from the camp. On the morning of the day of the accident, the weather was from 20 to 26 degrees below zero, moderated during the day, and grew colder again toward night. In the afternoon the defendant Beaulieu went to work at

* Decision rendered, Dec. 3, 1918. 169 N. W. Rep. 568.

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the wrong skidway. About 3 o'clock in the afternoon the foreman discovered the error, at which time the defendant returned to the right skidway, found that they were behind on account of the mistake, and the defendant Beaulieu says that—

As a result he "rushed to get some logs ahead ready for the next morning, and by that time my feet sweat awful hard. About 5 o'clock I got ready to go to camp, and it was all ice from the woods clear up to camp, and my feet was wet and was awful cold that night, and before I got to camp I commenced to feel cold on my feet, * * * and afterwards found that they were frozen hard."

Upon this and other testimony to the same effect, the commission found that the defendant Beaulieu sustained personal injury resulting in his disability while in respondent's employ and while performing service growing out of and incidental to his employment; that such injury was proximately caused by accident, and other formal findings. An order was entered awarding the defendant Beaulieu compensation, and from the judgment of the circuit court affirming such order the plaintiff appeals.

Brown, Pradt & Genrich, of Wausau, for appellant.

Spencer Haven, Atty. Gen., and Winfield W. Gilman, Asst. Gen., for respondents.

ROSENBERRY, J. (after stating the facts as above). Plaintiff claims that an injury by a frost bite is not an injury proximately caused by accident within the meaning of subdivision 3 of section 2394—3:

"Sec. 2394—3. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, in those cases where the following conditions of compensation occur:

"(1) * * *

"(2) * * *

"(3) Where the injury is proximately caused by accident, and is not intentionally self-inflicted."

[1] The facts being undisputed, the question is: Has the employee, Beaulieu, brought himself within the provisions of the act under the doctrine approved by this court in the case of Hoenig v. Industrial Commission, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339. See cases cited. Injuries to employees for which compensation is to be paid under the Workmen's Compensation Act are such as are incidental to and grow out of the employment. Compensation is not given for an injury resulting from exposure to a hazard which is not peculiar to the industry or substantially increased by reason of the nature of the services which the employee is required to perform.

[2] Injury by freezing is certainly not peculiar to the industry in which the defendant Beaulieu was engaged. Did the nature of Beaulieu's employment expose him to a hazard from freezing which was substantially increased by reason of the services which he was required to perform? It has been well said that the causative danger need not have been foreseen or expected, but after its event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

[3] On the day in question by reason of the mistake, the defendant Beaulieu worked harder than he ordinarily did, as a result of which his feet became wet from perspiration, a circumstance which made them much more susceptible to cold, and as a consequence thereof his feet were frozen. It seems clear that the hazard to which the defendant Beaulieu was exposed was one which was incident to and can be fairly traced to

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his employment as a contributing cause, and that he would not have been equally exposed to such a hazard apart from his employment. If the defendant Beaulieu while engaged in his work had wet his feet by stepping into an open spring and the freezing had resulted therefrom, it could scarely be claimed that the injury was not proximately caused by accident. In this case, the condition of his feet was due to extra exertion caused by reason of a misunderstanding as to orders. Because there would be no logs for hauling in the morning, he was required to put forth an unusual and extra effort, which made him more susceptible to cold than he otherwise would have been. It is clear that the exposure of the defendant Beaulieu to injury by freezing was substantially increased by reason of the nature of the services which he was obliged to render. We think it must be held that the injury for which compensation was awarded was proximately caused by accident within the meaning of subdivision 3 of section 2394—3, Stats.

Judgment affirmed. Costs to be taxed against the appellants in favor of the respondent Beaulieu.

Owen, J., took no part.

SUPREME COURT OF WISCONSIN.

FRONTIER MINING CO. ET AL.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL FROM JUDGMENT CONFIRMING AWARD—NOTICE—STATUTES—"ADVERSE PARTIES."

In action to set aside award of Industrial Commission, appeal of employer and insurer from judgment confirming award must be dismissed, where notice of appeal was served on Attorney General, appearing for commission under St. 1917, § 2394—22, and clerk of court, but not on claimants, who are "adverse parties," on whom sections 3042, 3049, made applicable by section 2394—21, require service.

(For other cases, see Master and Servant, Dec. Dig. § 418[3½]

(For other definitions, see Words and Phrases, First and Second Series, Adverse Party.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceeding under the Workmen's Compensation Act (St. 1917, §§ 2394—1 to 2394—95) by William Hynes and Julia Hynes for compensation on account of the death of their minor son, opposed by the Frontier Mining Company, the employer, and the insurer. Compensation was awarded by the Industrial Commission, and the employer and insurer brought action against the commission and claimants to set aside the award, resulting in judgment confirming the award, and the employer and insurer appeal. On motion to dismiss the appeal. Appeal dismissed.

The respondents Hynes and wife filed a claim with the Industrial Commission for compensation on account of the death of their minor

* Decision rendered, Nov. 6, 1918. 169 N. W. Rep. 312.

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son, alleged to have been accidentally killed while in the employ of the appellant mining company. The commission made an award in their favor, whereupon the mining company and the insurance company which had insured the risk brought this action to set aside the award. The claimants did not appear in the circuit court, but the Attorney General appeared for the commission, and after a trial was had the award of the commission was confirmed, and the mining company and insurance company gave notice of appeal to this court. The notice was directed to the Attorney General and his assistant, Mr. Messerschmidt, who appeared for the commission in the trial court; also to the clerk of the trial court. It was served on the Attorney General and clerk, but not on the claimants, Hynes and wife. The respondents now move to dismiss the appeal, because the notice was never served on the claimants and the time for appealing has expired.

Roehr & Steinmetz, of Milwaukee, for appellants.

Spencer Haven, Atty. Gen., and J. E. Messerschmidt, Asst. Atty. Gen., for respondents.

WINSLOW, C. J. (after stating the facts as above). The statute provides that in such cases as the present it shall be the duty of the Attorney General to appear on behalf of the Industrial Commission, both in the circuit court and on appeal in this court. Section 2394—22, Stats. Wis. 1917. It is further provided that any party aggrieved by the judgment of the circuit court in such an action as the present may appeal therefrom within the time and in the manner provided for appeals from orders of the circuit court. Section 2394—21, Stats. Wis. 1917. Appeals from orders are taken by serving notice of appeal on the "adverse party" and on the clerk of the trial court within 30 days from the date of service of a copy of the order, with notice of the entry thereof. Sections 3042 and 3049, Stats. Wis. 1917. In the present case the notice of appeal was not served on the claimants, and the time limited for service thereof has expired.

It seems clear that the motion must be granted. The claimants, in whose favor the judgment below was rendered, are manifestly the "adverse parties" upon whom the statute requires service of the notice of appeal. They own the judgment of which the appellants complain, and are the only persons who have any substantial pecuniary interest in maintaining it. True, the Industrial Commission is also a party defendant, and the law requires the Attorney General to appear for the commission in the circuit court and in this court. It is true, also, that in defending the award for the commission he necessarily defended the interests of the claimants, but nowhere does the statute make him their attorney: on the contrary, the statute expressly says that he shall appear "on behalf of the commission." The Legislature could doubtless make him the attorney of the claimant, at least for the purposes of perfecting the appeal; but this court has no power to do so.

Appeal dismissed.

Owen, J., took no part.

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UNITED STATES DISTRICT COURT.

D. MARYLAND.

SIEBERT

v.

PATAPSCO SHIP CEILING & STEVEDORE CO. et al.*

1. MASTER AND SERVANT—ELECTION OF REMEDY—WORKMEN'S COMPENSATION ACT.

A stevedore, injured while loading a vessel, who was entitled under Judicial Code, § 24, par. 3, as amended by Act Oct. 6, 1917, to the remedy afforded by the state Workmen's Compensation Act, *held* not to have elected that remedy by signing at the request of an attorney the notice to his employer contemplated by the Compensation Act, and to be entitled to sue in admiralty, etc.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

In Admiralty. Libel by John Siebert against the Patapsco Ship Ceiling & Stevedore Company, the Prince Line, Limited, and Furness Withy & Co., Limited. Decree for libelant against the first-named respondent.

George T. Mister, of Baltimore, Md., for libelant.

John B. Deming and Whitelock, Deming & Kemp, all of Baltimore, Md., for respondents.

ROSE, District Judge. On January 5th last the respondent, the Patapsco Ship Ceiling & Stevedore Company, hereinafter called the "employer," was engaged through its employees, of whom the libelant was one, in loading the Chinese Prince, hereinafter referred to as the "ship." The respondents the Prince Line, Limited, and Furness Withy & Co., Limited, were respectively owner and agent of the ship.

The libelant was working in the ship's hold. By the fall of one of the strong backs intended to support the hatch covers, one of his legs was so badly crushed as to necessitate amputation below the knee. He suffered other serious and painful injuries, but these, fortunately, proved to be temporary.

[1] One week after the accident libelant signed the notice to the employer, contemplated by the Workmen's Compensation Act of Maryland, that he had been hurt, and requesting that it should, in accordance with law, supply him with medical attendance. This notice was countersigned by a well-known member of the Baltimore bar, and by or through the latter was promptly served upon the employer. Thereafter the same attorney filed a claim with the state Industrial Accident Commission. Because libelant was long in the hospital, the hearing was put off, and before it was actually held he asked permission of the commission to withdraw his claim. After inquiry, the commission permitted him to do so, on the ground that in the condition he was at the time he signed the notice he did not so appreciate its nature as to make it fair to hold that he had irrevocably committed himself by it. The employer in this court insists that, in spite of the findings and action of the commission, the delivery of the notice was a final election to waive libelant's right to proceed in the admiralty.

* Decision rendered, November 7, 1918. 253 Fed. Rep. 685.

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The libelant here testified that he signed such notice because it was brought to him by a young man who told him he should sign it. It was then only a week after the accident, and he was in such a state of pain from some of his injuries that he could not, and did not, give the matter any consideration, but appended his signature, as he had been bidden to do. He said he thought the young man referred to was an assistant to the member of the bar who had countersigned the paper, but how either of them had learned of the accident, or who, if any one, had asked either of them to interest himself in the matter, he did not know. I sent at once for the attorney in question, and he testified that he had never seen the libelant until the latter was out of the hospital, and had come to tell him that he wanted to put his case in other hands. He further stated that the matter had originally been brought to him by a young lawyer, whose name he gave, and for whom he had occasionally tried cases; but the gentleman had at least temporarily quit practice to accept employment in a munition plant. There the evidence on this branch of the case stopped, except that it appeared that the employer, in consequence of the notice referred to, but without the knowledge of the libelant, had shortly after the accident paid $29 of the latter's hospital expenses. Before he was discharged from the hospital, his total bill had run up to $266.

The evidence shows, as the commission held, that the libelant did not appreciate, and was not in a condition to appreciate, the significance of the paper he had signed, nor did he know that the person who procured his signature was claiming to act as his representative. Every rational system of jurisprudence strives to insure, as far as may be, that a man shall not lose important rights merely because he has done some formal thing in excusable ignorance of its nature and significance.

When it came out for the first time at the hearing in this court that the $29 had been paid, I required the libelant to reimburse the employer as a condition to going on with his case. This was done at once. I did not intend to rule that such a requirement should always be made, as sometimes it might work hardship and injustice; but it is obviously fair wherever the libelant is in a condition to comply with it, as in this case he was. In this state of the record, it is unnecessary to decide anything, except that this libelant was free to prosecute his libel. Whether he could have done so, had he understandingly invoked the jurisdiction of the commission, need not be passed upon.

The act of Congress approved October 6, 1917 (40 Stat. 395, c. 97) gave an employee, injured on water, the right to avail himself of the Workmen's Compensation Law of the state. This result was accomplished by amending paragraph 3 of section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1916, § 991].) The relevant portions of that paragraph were a part of the original Judiciary Act of 1789, and gave the District Courts of the United States cognizance of "all civil cases of admiralty and maritime jurisdiction, saving to all suitors the right of a common-law remedy, where the common law is competent to give it." The amending statute added the words, "and to claimants the rights and remedies of the Workmen's Compensation Law of any state." So far as I know, it has never been held that the mere institution of a common-law suit to recover for a maritime tort precluded the plaintiff from subsequently seeking relief in admiralty.

[2, 3] It remains to pass upon the merits. The accident happened because the libelant was working under a hatch beam or strong back, which had not been removed, and which was not bolted in place. The hook or the chain, used to raise and lower the load, caught under the beam and pulled it out of its support. There is no question that the place in which the plaintiff was working was under such circumstances, unsafe.

It is in evidence that the employer had given general instructions to

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its foremen always to remove all the hatch beams, or, if any were left in place, to see that they were firmly secured by bolts or pins. It is argued that the foreman was a fellow servant of the libelant, and that the latter assumed the risk of his negligence. It is true that the instruction was given, and that the chief executive of the employer appreciated its importance, and was sincerely anxious that it should be obeyed. It is equally clear, however, that his subordinates habitually disregarded it, in that they never made any real attempt to see that it was enforced.

To remove the hatch beam took from 5 to 15 minutes. The bolts for it were not always right at hand. The foreman and the gang leaders were anxious to maintain their tonnage record. Familiarity with danger made them careless of the safety of the men under them. So generally was the instruction ignored, and so easy would it have been for the employer to have discovered that fact, that it cannot now successfully claim that by merely issuing the order it had done all that was incumbent on it to make sure that the men were given a safe place in which to work. That obligation it could not delegate. Moreover, the foreman or "chargeman," who should have seen that the beam was removed or bolted in, was, upon the evidence, a vice principal, rather than a fellow servant, of the libelant. He had full charge of the loading of the ship and of all the men employed in doing it. Subject to his orders were the gang leaders, who had the right to employ and discharge the workmen—in the modern vernacular, the power of "hiring and firing." The men who did the actual work were bound to obey the orders of the foreman. I am satisfied, although he denies it, that he gave the order not to remove some of the beams, including the one which fell on the libelant, and that the libelant and his fellow workmen, if they were to maintain their places, had no choice other than to do what he told them to do. The employer must be held liable.

There is nothing shown to charge either of the other respondents, and as to them the libel must be dismissed.

[4] The costs of medical attendance, of the artificial limb, and the loss of wages of libelant while in the hospital, total $791. I will allow $3,000 more as compensation for his suffering and permanent injuries, or an aggregate of $3,791.

A decree against the employer for that amount will be signed.

SUPREME COURT OF ERRORS OF CONNECTICUT.

AHERN

v.

SPIER ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"PERSONAL INJURY"—SUNSTROKE.

Where sunstroke paralyzed a definite portion of employee's brain, so that it no longer discharged its proper functions, and death shortly resulted in accordance with the ordinary process of such a disturbance

* Decision rendered, Dec. 17, 1918. 105 Atl. Rep. 340.

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of the brain, employee sustained a "personal injury" within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Personal Injury.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CONPENSABLE INJURY.

Death from sunstroke *held* compensable injury under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"IN THE COURSE OF AND OUT OF HIS EMPLOYMENT."

It clearly appearing that employee, when stricken, was doing what he was employed to do, sunstroke arose "in the course of and out of his employment," within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—USUAL EXPOSURE.

That employee was not exposed to sunstroke in greater degree than others in the same employment, and than many other out-of-door workers, is immaterial.

(For other cases, see Master and Servant, Dec. Dig. § 374.)

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Proceedings by Margaret Ahern to recover compensation under the Workmen's Compensation Statute for the death of one Ahern, employee, against Moritz Spier, employer, and the Travelers' Insurance Company, insurer. From a judgment of the superior court, affirming the award of the compensation commissioner of the third district, in favor of claimant, and dismissing the appeal, employer and insurer appeal. No error.

Robert C. Dickenson, of Hartford, for appellants.
Charles S. Hamilton, of New Haven, for appellee.

WHEELER, J. The deceased, Ahern, on August 2, 1917, was engaged in shoveling coal, which had been dumped on the sides of a track located in a building set about 20 feet from the ground, upon piers with driveways beneath. From the track to the peak of the roof, which was covered with tar paper, was about 17 feet. The roof extended beyond the sides of the building, leaving an open space between the sides and the roof, and at either end of the building, at about the level of the track, was a door.

The day was hot, as the three days preceding it had been, and one apt to cause a sunstroke, particularly in view of the fact that it had been preceded by very hot days. During the morning Ahern felt the effects of the heat, and at 11 o'clock in the forenoon he collapsed as a result of the heat, and at all times after the collapse he had a very high temperature, and on the same day he died from sunstroke, or thermic fever. Sunstroke generally comes on during a prolonged period of heat, and is caused by a disturbance of that portion of the brain controlling the regulation of heat in the human body.

The employment of Ahern did not expose him in a substantially

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greater degree to heat and the effects of the sun than others in the same employment, and than many other out-of-door workers were exposed. But the exposure in this employment was far greater than the exposure of the community, and the risk to Ahern from heat and the effects of the sun was substantially greater than that of the community. The foregoing facts are a part of the finding.

The appeal raises two questions:

(1) Whether death from sunstroke is a death from compensable injury?

(2) Whether Ahern was exposed to such risk as to make the result thereof compensable?

[1] The first question depends upon whether Ahern sustained a "personal injury" within the meaning of the Workmen's Compensation Statute (Pub. Acts 1913, c. 138).

In Linnane v. Ætna Brewing Co., 91 Conn. 158, 162, 99 Atl. 507, 509 (L. R. A. 1917D, 77), we said that the effect of the Miller Case, 90 Conn. 349, 97 Atl. 345, L. R. A. 1916E, 510, and the Larke Case, 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E, 584, together is that "personal injury" within the meaning of the statute is a bodily injury due to accident. We there defined an accidental bodily injury as—

"a localized abnormal condition of the living body, directly and contemporaneously caused by accident; and an accident * * * as an unlooked-for mishap, or an untoward event or condition not expected."

And we said:

"The concurrence of accident and injury is a condition precedent to the right to compensation."

The finding of the trial court is entirely clear. The sunstroke paralyzed a definite portion of Ahern's brain, so that it no longer discharged its proper function in connection with the distribution of heat in his body; as a consequence, his temperature rapidly rose, and death shortly resulted in accordance with the ordinary progress of such a disturbance of the brain.

This finding points out a bodily harm and incapacity to Ahern, and indicates a localized, abnormal condition of body. It brings the sunstroke directly within our definition of a personal injury under the act. Linnane v. Ætna Brewing Co., 91 Conn. 162, 99 Atl. 507, L. R. A.1917D, 77.

The memorandum of the Commissioner which is made a part of his finding recites:

"In sunstroke there is either an instant of time when it may be said with practical certainty that the change has taken place, or at most it is attributable to a short period of time. * * * There is a moment of time when the change from the normal to the abnormal takes place, when the portion of the brain involved becomes so changed that it no longer functions properly, and when it can no longer control the heat distribution."

This untoward event or unexpected condition under which Ahern's work was carried on therefore constituted an accident which directly and contemporaneously caused this localized abnormal condition.

[2] We conclude that under the authority of our decisions Ahern's death from sunstroke was a compensable injury.

[3] The second question, "Whether Ahern was exposed to such risk as to make the results thereof compensable," is determined by ascertaining whether the sunstroke arose "in the course of and out of his employment." It clearly appears that he was doing what he was employed to do when he was stricken; hence the sunstroke did occur in the course of his employment.

"An injury 'arises out of' an employment when it occurs in the course of the employment and as a proximate cause of it." Larke v. Hancock Mutual Life Ins. Co., supra.

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An employment will be a proximate cause of an injury when it is the natural and necessary incident of the employment, or when the employment brings with it greater exposure to injurious results than those to which persons generally in that locality are exposed, and such injurious result occurs in the course of the employment. Larke v. John Hancock Life Ins. Co., supra.

[4] The finding explicitly brings this case within this rule. It does appear that the sunstroke was an incident of Ahern's employment. And that his exposure and risk to sunstroke in this employment was far greater than that of the rest of the community. This is the final test applied by us in the Larke Case. That Ahern was not exposed to sunstroke in greater degree than others in the same employment, and than many other out-of-door workers, we hold to be immaterial, as we did in the Larke Case.

There is no error.

The other Judges concurred.

SUPREME COURT OF ERRORS OF CONNECTICUT.

JACKSON

v.

BERLIN CONST. CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEATH BENEFIT—DEDUCTION OF PAYMENTS TO DECEASED.

Injured employee's compensation under Gen. St. 1918, §§ 5351, 5352, paid pursuant to voluntary agreement with employer under section 5361, cannot be credited, upon employee's death, against compensation awarded dependent under section 5349, notwithstanding Gen. St. § 14, part B.

(For other cases, see Master and Servant, Dec. Dig. § 386[2].)

Appeal from Superior Court, New London County; Gardiner Greene, Judge.

Proceedings under Workmen's Compensation Act by Antonia Jackson, for compensation for death of her husband, opposed by the Berlin Construction Company, employer, and another. Award of compensation commission modified by superior court, and claimant appeals. Judgment set aside, and cause remanded, with direction.

Wilson H. Pierce, of Waterbury, for appellant.

Christopher L. Avery, of New London, for appellees.

WHEELER, J. Jackson, an employee of respondent Berlin Construction Company, received an injury on March 26, 1914, consisting of a fracture of his right leg, which arose in the course of and out of his employment. A wound was produced by this injury; it did not heal, and it became necessary to amputate the leg. As a result of these injuries he died on March 18, 1916.

* Decision rendered, Dec. 17, 1918. 105 Atl. Rep. 326.

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Jackson and the Construction Company entered into a voluntary agreement in accordance with the Compensation Act, and duly approved by the commissioner under which Jackson received weekly payments, together with the medical, surgical, and hospital services, in all amounting to $1,010.

The commissioner awarded to the claimant dependent $750, being compensation at the rate of $10 per week for 65 weeks from March 17, 1916, to June 14, 1917, plus $100 for funeral expenses, and a further compensation of $10 per week for a period of 247 weeks.

The superior court sustained the appeal from the commissioner, and modified the award by crediting the respondents, upon the judgment, with said sum of $1,010, being the amount paid to Jackson under the voluntary agreement. The sole question raised upon the appeal is as to the ruling of the court modifying the award by crediting the amount paid to Jackson in his lifetime.

The legality of such a credit depends upon whether under our act the compensation paid to this employee was an indivisible part of the compensation awarded after death to the dependent. If so, the statute must be so construed as to give this credit. But if the compensation is separable and that paid to the employee is independent of that paid to the dependent, a construction compelling this credit could not be made unless the language of the statute were imperative. The General Statutes, §§ 5351, 5352, provide that compensation for either total or partial incapacity "shall be paid to the injured employee." It is paid to him because the statute intends to provide support for him during his period of incapacity. Whatever is paid him belongs to him. Whatever of compensation accrues in his lifetime and is unpaid becomes upon his decease an asset of his estate.

The voluntary agreement was made under General Statute, § 5361, between the employer and the employee. The dependent had no privity with this contract, and no right to its payments in the lifetime of the employee or to any which remained unpaid at his decease.

Compensation for death General Statutes, § 5349, provides shall be paid (a) for burial expenses $100; (b) to those wholly dependent upon the deceased employee a certain weekly compensation; (c) in case there is no one wholly dependent upon the deceased a certain weekly compensation to those partially dependent.

This compensation does not arise until the decease of the employee. He has no interest in it. His estate has no interest in it except as to the compensation for burial expense. Only those who are wholly or partially dependent are entitled to the weekly compensation.

The statute (General Statutes, § 5350) defines who are dependents, and none other can claim this compensation.

The compensation awarded the dependent is made to take the place of the wages which the employee can no longer earn, and in which those who were dependent upon him for support had an interest. The purpose of the statute is benefit to the dependent, not to the estate of the deceased employee.

Only the dependent or his assignee can discharge the liability arising out of this compensation. The right of the dependents to compensation upon the death of their decedent comes from the statute, not from the deceased.

The credit of compensation paid to the employee against the compensation awarded the dependent assumes, of necessity, that the dependent had an interest in the compensation paid the employee; otherwise it could not be used by way of set-off or recoupment.

Under the common law the right to damages for a decedent's death formed no part of the decedent's estate, and claims against him or it could not be used by way of set-off, counterclaim, or recoupment against the death claims.

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The compensation by the act continues not "longer than 312 weeks after death." A stronger claim might have arisen that payments to the decedent employee in his lifetime were intended to be deducted from the award to the dependent, had the language used been "after injury" instead of after death.

The intent of the Workmen's Compensation Act to make the claim of the injured employee for compensation for his incapacity a personal claim belonging to him alone and to make the claim of the dependent for compensation came into existence upon his death and to belong wholly to him, and neither to be the subject of set-off, counterclaim, or recoupment against the other, seems entirely clear, unless section 14 of part B (Pub. Acts 1913, c. 138) New General Statutes, § 5354, specifically recognizes such a right. This provision reads as follows:

"In fixing the amount of any compensation under this chapter due allowance shall be made for any sum which the employer may have paid to any injured employee or to his dependents on account of the injury, except such sums as the employer may have expended or directed to be expended for medical, surgical or hospital service."

The respondent asserts that this section of the act concludes the discussion, and entitles the respondent to this credit. To overthrow the clearly expressed intent of that act, supported as it is by the better reason, requires us to find language which clearly leads to this conclusion. We do not think this section intended any such result. The due allowance which is to be made is the sum already paid to the employee, and it is the sum already paid to the dependent; neither shall be paid twice.

The compensation to the employee is distinct from that to the dependent. The allowance of payments made to the employee cannot be made against the compensation to the dependent, and vice versa.

A different construction might lead to the anomaly of having the entire claim of the dependent exhausted by a credit of sums paid the employee for the injury which later resulted in death.

The compensation expressly given the dependent by this act should not be permitted to be diminished by crediting sums paid the employee in his lifetime, unless this course is plainly sanctioned by the statute. And we think the contrary is the reasonable construction. We cannot agree with the trial court that the meaning of this language, grammatically regarded, is that any previous payments to either employee or dependents shall be allowed for in fixing subsequent compensation to either.

The trial court assumes in its reasoning that the payments to the employee were payments to the dependent. This is quite contrary to the fact and the law. The payments to the employee belonged to him. The court failed to note that the act provides two distinct forms of compensation, the one for incapacity, the other for death; the one payable to and belonging to the employee, the other payable to and belonging to the dependent.

The heading of the section "Allowance for Advance Payments" expresses the purpose of the section, the payment upon an obligation before it was due or determined. But the payments made to Jackson were due under the voluntary agreement, and were paid for his benefit.

The employer may make advance payments to the employee or to the dependent, and this section intended to give him the right to credit upon the amount found due the employee the credits made to the employer, and upon the amount found due the dependent, the credits made to the dependent.

English authorities permitting the deduction claimed follow the specific terms of their statute. Massachusetts has decided the respondent's contention adversely to it. Cripp v. Ætna Life Insurance Co., 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828; Nichols v. London Guarantee & Accident Co., 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915C, 862.

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There is error, the judgment is set aside, and the cause remanded, with direction to the superior court to enter judgment dismissing the appeal from the commissioner.

The other Judges concurred.

SUPREME COURT OF ERRORS OF CONNECTICUT.

RAINEY

v.

TUNNEL COAL CO. ET AL,*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—FAILURE TO ACCEPT MEDICAL TREATMENT—"WILLFUL AND SERIOUS MISCONDUCT."

Claimant's failure to consult a physician until two weeks after injury *held* not to justify denial of all compensation, in view of Gen. St. 1918, § 5347, his conduct not amounting to "willful or serious misconduct," which would possibly justify such denial under section 5341.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.)

2. MASTER AND SERVANT—FINDINGS OF COMMISSIONER—REVIEW.

Where findings of subsidiary facts on which commissioner based his conclusions stand uncorrected on the record, they furnish the only basis of facts for testing the correctness of his conclusions.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

3. MASTER AND SERVANT—FAILURE TO CONSULT PHYSICIAN—UNREASONABLE CONDUCT.

Conclusion of commissioner, that claimant's conduct in not consulting a physician until about two weeks after the injury was not unreasonable, *held* correct, when tested by his findings of subsidiary facts uncorrected on the record.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPEAL—CERTIFIED TRANSCRIPT OF THE EVIDENCE.

Where none of reasons of appeal ask for correction of any specific finding of a subsidiary fact of a commissioner, there is no occasion for a certified transcript of the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—REVIEW.

On appeal from award of compensation, the superior court may, by an order in the nature of a writ of certiorari, require the whole or

* Decision rendered Dec. 17, 1918. 105 Atl. Rep. 333.

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any part of the transcript of evidence to be certified up and made a part of appeal record.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—CONCLUSION OF COMMISSIONER—REVIEW.

Where reasons of appeal do not ask for the correction or omission of some specific finding as to a subsidiary fact, or an addition of a material fact, not found, reasons of appeal alleging that evidence was insufficient to warrant commissioner in finding, etc., do not present any assignable reasons of appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

Appeal from Superior Court Hartford County; William S. Case, Judge.

Proceedings under the Workmen's Compensation Statute by William Rainey against the Tunnel Coal Company and others. From a judgment of the Superior court, setting aside the award, claimant appeals. Error, and cause remanded to Superior Court, with directions to enter a judgment dismissing appeal from the award.

The commissioner found the following facts, among others: On December 27, 1917, claimant, while employed in unloading bags of coal from the respondent's wagon, froze the fingers of both hands. He notified his employer the next morning and was advised to consult a physician. The employer intended to indicate to the claimant that he should have medical attention at the expense of his employer; but the representative of the employer corporation, who talked with the claimant, did not express that intention, nor did he provide medical attention Claimant did not consult any physician and attempted to treat the fingers at home. About two weeks after the injury, the claimant did consult a physician and then received treatment at the Hartford Hospital. Had the claimant received prompt medical attention, the period of disability would have been considerably shortened. The commissioner also found as conclusions of fact that claimant's conduct was not unreasonable, that the injury arose out of and in the course of his employment, and that as a result of the injury the claimant had been since January 6, 1918, totally incapacitated, and would continue to be incapacitated for several weeks. Compensation was awarded beginning January 13, 1918. The superior court made no change in or addition to the commissioner's findings of facts, but in its memorandum of decision directed that the award be set aside on the ground that the claimant's condition was due to his own neglect.

William H. Macdonald, of Hartford, for appellant.
Joseph Shelnitz, of New Haven, for appellees.

BEACH, J. (after stating the facts as above). [1] The ruling of the superior court that compensation should have been denied, because the claimant's condition was due to his own neglect to accept or provide medical service until about two weeks after the injury, is erroneous, for the reason that the statute itself provides that the penalty for such neglect shall be a suspension of all right of compensation "during such refusal or failure." Section 5347, G. S. 1918. Possibly a claimant's refusal to accept or failure to provide medical treatment might be carried to such an extent as to amount to "willful and serious misconduct," which, by analogy with section 5341, G. S. 1918, would justify a denial of any compensation whatever; but this is not such a case.

[2, 3] Since the compensation award began as of January 13, 1918,

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more than two weeks after the injury, and therefore after the claimant first consulted a physician, the award would be unobjectionable even if the appeal record were in such form as to make it possible for us to reject the commissioner's conclusion that the claimant's conduct was reasonable, and to adopt the contrary conclusion emphatically expressed in the memorandum of decision filed by the superior court. It is apparent from the memorandum that the trial court reached its conclusion that the claimant's conduct was unreasonable and negligent, by independently weighing the evidence before the commissioner, as contained in a certified transcript accompanying the appeal. We cannot follow the court into that field of inquiry, because the findings of subsidiary facts on which the commissioner based his conclusion that the claimant's conduct was reasonable stand uncorrected on the record. That being so, they furnish the only basis of facts for testing the correctness of his conclusions either in the superior court or in this court; and, so tested, his conclusion is unquestionably sound.

[4, 5] It may also be observed that there was no occasion for a certified transcript of the evidence on the appeal to the superior court, because none of the reasons of appeal asked for the correction of any specific finding of a subsidiary fact. The superior court may by an order in the nature of writ of certiorari require the whole or any part of the transcript of evidence to be certified up and make it a part of the appeal record, whenever it appears necessary to do so in order to protect the substantial rights of parties not represented by counsel; but ordinarily no part of the evidence before the commissioner should be certified to the superior court unless the reasons of appeal ask for the correction or omission of some specific finding as to a subsidiary fact, or the addition of a material fact not found.

[6] The first and second reasons of appeal on this record, which allege that "the evidence was insufficient to warrant the commissioner" in finding (a) that the injury arose out of and in the course of his employment, and (b) that as a result of the injury the claimant was incapacitated as found, do not present any assignable reasons of appeal. They simply invite the superior court to ignore the Commissioner's findings of subsidiary facts and to retry the ultimate issues of fact upon an independent examination of a transcript of the evidence before the commissioner. We have repeatedly held that this cannot be done:

"The court cannot review conclusions of facts made by a commissioner which merely concern the weight of evidence and the credibility of witnesses." Powers v. Hotel Bond, 89 Conn. 143, 93 Atl. 245.

"The superior court cannot on appeal retry the facts." Kennerson v. Thames Co., 89 Conn. 367, 373, 94 Atl. 372, 374 (L. R. A. 1916A, 436).

"The power of the superior court in the correction of a finding of the compensation commissioner is analogous to, and its method of correcting the finding similar to, the power and method of this court in correcting the finding of the superior court." Thompson v. Twiss, 90 Conn. 444, 446 97 Atl. 328, 330 (L. R. A. 1916E, 506).

"The trial court does not retry the facts. It decides the appeal upon the findings made by the commissioner, unless the appeal assigns as error the finding or omission to find any facts, and the court finds that facts have been found or omitted, which, if found in accordance with the evidence, would affect the result. The right of the trial court to correct the finding of the commissioner is similar to that exercised by [this court] upon a proper appeal over the finding of a trial court." Swanson v. Latham, 92 Conn. 87, 90, 101 Atl. 492, 493.

The reference in Blanton v. Wheeler & Howes Co., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918A, 747, to the introduction of evidence in the superior court must be understood as restricted to evidence offered for the purpose of correcting the appeal record so as to make it present the

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questions which the appellant desires to have reviewed by the superior court.

There is error, and the cause is remanded, with direction to enter a judgment dismissing the appeal.

The other Judges concurred.

SUPREME COURT OF ERRORS OF CONNECTICUT.

SCALIA

v.

AMERICAN SUMATRA TOBACCO CO. et al.

SALA

v.

SAME.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—"IN COURSE OF AND OUT OF EMPLOYMENT."

Injury and death of tobacco plantation workers after they had entered into contract of employment, and while being driven to place of work in automobile furnished by employer pursuant to employment contract, arose in the course of and out of their employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Superior Court Hartford County; Lucien F. Burpee, Judge.

Proceeding under the Workmen's Compensation Act by the dependent mother of Josephine Sala and by Carmelo Scalia for compensation for death of Josephine Sala and Catherine Scalia, opposed by the American Sumatra Tobacco Company, employer, and another. Defendants' appeals from awards of Compensation Commission dismissed by Superior Court, and defendants appeal. No error.

Patrick Healey, of Waterbury, for appellants.

Michael G. Luddy and Thomas J. Molloy, both of Hartford, for appellees.

RORABACK, J. These two cases were tried together, and the findings and questions arising therein are identical. The questions presented by the appeals are: Did the superior court err in affirming the findings of the commissioner upon the evidence: (1) That the injury and death of the decedents arose in the course of their employment; (2) that the injury and death of the decedents arose out of their employment by the American Sumatra Tobacco Company, defendant; (3) that a contract of employment was entered into by the decedents with the tobacco company;

* Decision rendered, Dec. 17, 1918. 105 Atl. Rep. 346.

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(4) that a condition of the contract of employment was that the tobacco company would transport the decedents from Thompsonville to its South Windsor plantation by automobile, and that transportation was an essential part of the contract of employment, and reasonably incident thereto?

Following the general rule, this court has held that:

"When the finding and award of the commissioner appealed from are unauthorized in law, irregular, or informal, or based upon a misconception of the law, or of the powers or duty of the administrative tribunal, or are so unreasonable as to justify judicial interference, we may, on appeal, set aside the award." Powers v. Hotel Bond Co., 89 Conn. 149, 150, 93 Atl. 248.

There was evidence which plainly showed that: The claimants are the dependents of Josephine Sala and Catherine Scalia, who were killed when an automobile skidded and collided with a tree in the town of South Windsor, early in the morning of September 25, 1917. Prior to this date the decedents, with several other women, had been employed picking tobacco at the H. L. Vietts tobacco plantation in Hazardville, in the town of Enfield. The American Sumatra Tobacco Company, the defendant, was then engaged in the business of raising, harvesting, and marketing tobacco, and among other places had a plantation in South Windsor, upon which, during the harvesting season, it employed women in large number. On the 24th day of September, 1917, the defendant tobacco company instructed its agent, Ralph E. Moody, to employ some women who were quitting work at the Vietts plantation. The decedents were among these women, all of whom were foreigners and not well versed in the English language. Moody conferred with them, and told them, if they wanted work, to meet an automobile at the waiting station in the village of Thompsonville, in the town of Enfield, the next morning to be transported to the respondent's plantation in South Windsor. On the morning of September 25th two automobiles, driven by Norman H. Stetson, garage and livery man in Thompsonville, who were regularly employed and paid by the tobacco company for that purpose, met the women at the waiting station in Thompsonville and started for the respondent's plantation in South Windsor. On account of the slippery condition of the road, while upon the public highway in the town of South Windsor, one of the autos skidded, causing the death of the Sala and Scalia women and injuring several others.

There is no difficulty in reaching the conclusion that at the time these women were injured there was a contract of employment existing between them and the American Sumatra Tobacco Company. A more serious question presented by the evidence is: Were they injured before this employment began? The rule has been established:

"That the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right permitted, to use by virtue of that contract." Donovan's Case, 217 Mass. 78, 104 N. E. 431, Ann. Cas. 1915C, 778.

There was not any direct evidence as to the time when the employment of these women began. The compensation commissioner inferred that their transportation was an essential part of the contract of employment and reasonably incident thereto. There was evidence which reasonably supported such a conclusion. Although the decedents, at the time of the accident, had not actually commenced their work upon the tobacco plantation of the defendant company, it is plain that their transportation was a part of the contract of employment with this defendant. When they were injured they were not passengers, paying a stipulated fare for the conveyance to their work. The automobile which skidded and caused the accident in question was furnished and paid for by the

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defendant company. The relation that then existed between the women and the Sumatra Tobacco Company was that of master and servant, and not that of carrier and passenger. At the time they were injured they were laborers in the employ of the tobacco company. Pigeon v. Lane, 80 Conn. 240, 67 Atl. 886, 11 Ann. Cas. 371; Killduff v. Boston Elevated Railway, 195 Mass. 308, 309, 81 N. E. 191, 9 L. R. A. (N. S.) 873. This being so, the case is like Swanson v. Latham et al., 92 Conn. 87, 101 Atl. 492, in which we stated that:

"An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment."

There is no error.

The other Judges concurred.

SUPREME COURT OF ILLINOIS.

BERGSTROM

v.

INDUSTRIAL COMMISSION et al. (No. 12284.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—QUESTIONS OF FACT.

If there is any competent evidence fairly tending to support the claim of an applicant under the Workmen's Compensation Act, the reviewing court cannot consider the weight of the evidence, nor reverse because contrary to the preponderance of testimony.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —OUT OF AND IN THE COURSE OF EMPLOYMENT.

In a proceeding for compensation, under the Workmen's Compensation Act, for the death of an employee due to hypostatic pneumonia, evidence *held* sufficient to support a finding that death resulted from an accident arising out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Ann E. Shaw to obtain compensation for the death of George H. Shaw, opposed by Arvid B. Bergstrom, employer. An award was affirmed, and the employer brings error. Affirmed.

Sabath, Stafford & Sabath, of Chicago (Charles B. Stafford, and Thomas M. Zasadil, Jr., both of Chicago, of counsel), for plaintiff in error.

James Nicholas Lorenz, of Chicago, for defendant in error.

FARMER, J. George H. Shaw was employed by plaintiff in error as a sheet metal worker. On September 26, 1916, he received an injury

* Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 195.

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to his ankle and was taken to a hospital, where he was operated on October 14 and a bone, called the astragalus, removed. About four weeks later he was removed to his home. His doctor and hospital bills were paid by plaintiff in error, whose physician continued to treat him until December 14, after which time he was treated by Dr. Horn, his family physician. The wound from the operation healed and Shaw was able to move about the house on crutches and go out of doors when the weather was pleasant. His foot was kept in a cast for some time, and due to some cause an ulcer developed on the ball of his foot; also a pimple on the outer side of the leg formed, from which a small amount of pus was discharged, and a short time before his death a large abscess came on the back of his neck. On the afternoon of March 2 Shaw went with a friend for an automobile ride and was out from about 3 o'clock to about 6:30. The temperature was from 30 to 31 degrees. When Shaw returned home he ate his dinner, after which he went to a drug store near by to get some medicine for his injured foot. Later he retired to bed, and at 7:30 o'clock next morning ate breakfast in bed, consisting of coffee and a roll. He made no complaint of feeling ill. At 9 o'clock he called his wife to his bed and said he wanted to spit. His wife assisted him to rise up, when his head fell over on her shoulder, and she discovered he was dead. There was no struggle or shudder.

Mrs. Shaw made application for an award under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). On a hearing before an arbitrator the claim for an award was denied. The claim was presented to the Industrial Commission for review on the same evidence heard by the arbitrator and some additional evidence, and that body made an award in favor of the claimant. The award was reviewed, and affirmed by the circuit court. The presiding judge certified the case was a proper one for review by this court, and it comes here by writ of error.

There is no dispute that the parties were under and subject to the act, but an award is resisted on the ground that the death did not result from an accident arising out of and in the course of the employment.

Dr. Springer, the coroner's physician, testified he held a post mortem on Shaw. He described the condition of his foot and leg, and said on opening the body he found the right lung congested, and edematous and hypostatic pneumonia in the left lung. The heart was slightly enlarged. The liver was slightly congested, but both it and the kidneys showed no changes. The spleen was enlarged, soft, and pulpy, indicating sepsis. In his opinion Shaw "came to his death from hypostatic pneumonia, associated with injuries of the foot." He further testified:

"He died of general sepsis—one of the main factors causing the condition of hypostatic pneumonia."

It is insisted by plaintiff in error that the injury to the foot had no connection with the death; that the conditions which caused the death were the direct result of the exposure from the automobile ride. Shaw wore no overcoat during the ride. He had on flannel underwear, his limb was wrapped in flannel, and he was wrapped to the armpits in a heavy lap robe. Several physicians testified, most of them as experts. Their testimony is too voluminous and technical to set out in this opinion. They did not all agree, and the opinions expressed by some of them tend to support the contention of plaintiff in error. Others expressed the opinion that death resulted from the continued septic process, and that the ride in the automobile had nothing to do with it.

[1, 2] We cannot weigh the evidence. If there is any competent testimony fairly tending to support the claim of defendant in error, we cannot consider the weight of the evidence, and reverse the judgment because in our opinion it is contrary to the preponderance of the testimony. Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110; Bloomington, Decatur & Champaign Railroad Co. v. Industrial Board, 276 Ill. 454, 114

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N. E. 939; Schwarm v. Thompson & Sons Co., 281 Ill. 486, 118 N. E. 95. There was competent testimony to support the claim of defendant in error that the death resulted from an accident arising out of and in the course of the employment.

No errors of law are assigned for a reversal of the judgment, and it is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

CARSON-PAYSON CO.

v.

INDUSTRIAL COMMISSION et al. (No. 12281.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"SETTLEMENT"—FURTHER COMPENSATION.

Voluntary payments by the master, as provided by the Workmen's Compensation Act, which were accepted by the injured servant, *held* a "settlement" referred to in section 19, par. h; hence on recurrence of the disability the servant might within 18 months petition for further compensation.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

(For other definitions, see Words and Phrases, First and Second Series, Settlement.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS—RECURRENCE OF INJURY.

A finding of the Industrial Board that an injury had recurred, if based upon legitimate conclusion from facts proven by competent evidence, cannot be reviewed by the courts.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—COMPENSATION—DECISION OF ARBITRATOR.

A decision of the arbitrator in a workmen's compensation case, where not reviewed, is a final adjudication up to that time.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

4. MASTER AND SERVANT—COMPENSATION—RECURRENCE OF INJURY.

A finding of the Industrial Board that an injury for which a servant had already received compensation had recurred *held* to have sufficient support in the evidence, so that matter could not be reviewed by the courts.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW—HARMLESS ERROR.

Where the evidence on a petition by a servant for further compensation on the ground of the recurrence of an injury for which he had already

* Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 264.

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received compensation would have supported a finding of total disability, the master cannot complain of a finding of partial disability.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Error to Circuit Court, Vermilion County; John H. Marshall, Judge.

Application by Stephen Oliver under the Workmen's Compensation Act for compensation for injuries received while in the employ of the Carson-Payson Company. An award by the Industrial Board was affirmed by the circuit court, and the Carson-Payson Company brings error. Affirmed.

J. C. M. Clow, of Chicago, for plaintiff in error.

Colfax T. Martin and Charles Troup, both of Danville, for defendant in error.

DUNCAN, C. J. While working for plaintiff in error on October 28, 1915, Stephen Oliver fell from a scaffold and broke his left ankle, both wrists, one or more ribs, and a nail was driven through the upper part of his right cheek. Both parties were operating under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) and the accident arose out of and in the course of the employment. At the time of his injuries Oliver was earning and receiving for his wages the sum of $12 per week. Temporary total disability resulted from the accident, and on the eighth day after the injury plaintiff in error commenced to pay Oliver compensation at the rate of $6 per week. This amount was paid and received up to and including May 12, 1916, the date of the last payment. On June 14, 1916, Oliver filed with the Industrial Board his petition for adjustment of claim, and the case was heard by the arbitrator July 28, 1916. The arbitrator found that the temporary total disability payments had all been paid, and that the petitioner was not entitled to compensation for the reason that "he is earning more than he received at the time of his injury." On August 15, 1916, a petition for review of the arbitrator's finding was filed with the Industrial Board, but the proceeding was not followed. On September 27, 1917, within 18 months from the date of the last payment of compensation, Oliver filed with the Industrial Board his petition for a review of an agreement—the date of the last payment of compensation being given therein as the date of said agreement—under the provisions of paragraph (h) of section 19 of the Workmen's Compensation Act (section 144). Evidence was heard on this petition on the question whether or not the disability of the petitioner had recurred or increased since the original hearing on application for adjustment of his claim for compensation, and on April 11, 1918, the Industrial Board found that his disability had recurred and increased on December 1, 1917, and that by reason thereof he sustained a partial permanent disability and loss of earning power. The board awarded him $4 a week for a period of 386 weeks, beginning December 1, 1917. The award was affirmed by the circuit court of Vermilion county, and this writ of error was sued out of this court.

[1-3] The voluntary payments by plaintiff in error of compensation as provided by the act and the acceptance of the same by Oliver following the injury constituted such agreements as are referred to in paragraph (h) of section 19. Oliver had the right, in case his disability recurred after the hearing which resulted in the decision of July 28, 1916, to invoke the provisions of paragraph (h) of section 19 and to have compensation awarded him because of such recurrence of his disability, within 18 months of the date of the payment of the last installment. Simpson Construction Co. v. Industrial Board, 275 Ill. 366, 114 N. E. 138. The question whether the disability had recurred or increased was one of fact for determination by the Industrial Board upon consideration of the

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stenographic report of the original hearing and the additional evidence with respect to the increase or recurrence of the disability. If the finding of the Industrial Board that the disability has recurred or increased is based upon a legitimate conclusion from the facts proved by competent evidence, such finding is conclusive upon the courts, but not so if it is based upon conjecture or surmise. Squire-Dingee Co. v. Industrial Board, 281 Ill. 359, 117 N. E. 1031. The decision of the arbitrator on July 28, 1916, not having been reviewed, is a final adjudication upon all matters in dispute up to the time of that hearing, and upon the hearing to review the agreement on the ground that the disability had recurred the additional evidence should be limited to the question whether or not the disability had recurred. Bloomington, Decatur & Champaign Railroad Co. v. Industrial Board, 276 Ill. 120, 114 N. E. 511; Casparis Stone Co. v. Industrial Board, 278 Ill. 77, 115 N. E. 822.

[4, 5] Plaintiff in error contends that the finding of the Industrial Board that the petitioner's disability had recurred and increased and that his disability is partial is not legitimately based upon any competent evidence in the record. The finding of the arbitrator at the original hearing is conclusive that at that time the petitioner had so far recovered from his injury as to be able to work and was earning more money than he did before he was injured. Upon the hearing for review the petitioner testified that from the time of the former hearing, July 28, 1916, and up until November, 1917, he had been able to work about a third of the time; that he had not been able to work any since November, 1917, because of a bad heart, his nervous condition, and pains in his head; that he had sharp pains running through his heart, could not lie on his left side, and could not sleep; that the injury to his jaw has increased since the original hearing, so that he had to have two teeth removed from his upper jaw where the nail penetrated it, on account of abscesses forming, and two more teeth were affected; that he could not use that side of his face for chewing or biting; that a short time before the present hearing, while attempting to work, he had a severe pain in his head and had to go to bed and be attended by a physician; that he had trouble with his bowels swelling up and becoming sore, and had hemorrhages and soreness in his side from his broken rib; that his ankle was in a more stiffened condition than at the former hearing, so that in climbing over a roof in performing his work as a carpenter his ankle became weak and if he stepped sideways made him lame for some time, but that it did not do this before the former hearing. The sum and substance of his testimony is that total disability has recurred to him in December, 1917, and up until the time of the hearing in April, 1918, because of the condition of his heart, the pains in his head, and the impairment of his nervous system. His physician, Dr. Wilkinson, testified that he was called to attend petitioner a few weeks prior to the present hearing; that petitioner had severe pains in the abdomen and complained of severe headaches; that the bowel condition cleared up when he got the bowels regulated, and he thought it just a case of intestinal fermentation, which occurs to any one, and was a temporary, transient condition; that there could be a connection between the wound which petitioner had in his cheek and the pain in his head, and the result of the nail wound might have some effect on his ability to work; that he found some indications of valvular trouble of the heart, but that there had never been indications that the heart had not been able to carry on its functions properly; that there has not been, apparently, any very great change in petitioner's general condition of health in the last two years. Three other physicians substantially corroborated Dr. Wilkinson. One of them, Dr. Scott, testified that the petitioner had lost a fair amount of flesh, and that his general appearance has changed from the effect of something on his nervous system, and that he has irregular heart action, and that stomach trouble and other things may follow that condition.

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None of the physicians testified as to the extent of petitioner's disability, if any, resulting from his injuries in addition to his condition at the original hearing. The only other testimony found in the record concerning the extent of his disability is that of Charles Dobbins, who only testified as to his condition up to November, 1917. He testified that petitioner worked for him at carpenter work almost steadily from April to November, 1917, and quit working for him in November, 1917, because he did not have any work after that time. He was asked about petitioner's efficiency as a workman compared to what it was before the accident. He replied that his ability had been affected at least a third since the accident. He also testified that petitioner had worked for him from April to August, 1916, and at the time of the original hearing, and that he did not notice any particular difference; that he appeared to do about the same amount of work both years; that he could not see anything in his work that indicated a growing inefficiency and did not notice any decrease in his ability to do a day's work.

The testimony of defendant in error tends to show that since December 1, 1917, he had been totally unable to work, and his own testimony, as contended by plaintiff in error, tended to show that he was totally disabled and entitled to $6 a week and not partially disabled and only entitled to $4 a week. There is no other testimony in the record that covers his ability to work during and since December 1, 1917, the time fixed by the Industrial Board when the recurrence and increase of disability commenced and from which time the payments of the award were to begin. The substance of plaintiff in error's argument is that, as the board did not allow defendant in error the full amount of compensation his own testimony would entitle him to receive, the board disregarded his testimony, and that, as there is no other testimony in the record upon which the award could be legitimately based, the award should be set aside. The finding and award are evidently based largely, if not entirely, upon the testimony of defendant in error, as there was no other evidence to support it. Just how the board arrived at the conclusion that his disability was partial does not appear from the record, but it must be admitted that, if the board had found total disability and made the award accordingly, such a finding and award would have been sustained by the record, and plaintiff in error practically makes such an admission. It cannot be said, therefore, that the evidence in the record does not sustain the full amount of the board. Whatever error the board made, if any, was against the defendant in error and in favor of the plaintiff in error. Under such a showing, we would not be warranted in setting aside or reserving the judgment of the circuit court confirming the award, upon the familiar doctrine that plaintiff in error cannot take advantage of an error that is not prejudicial to it.

The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

STORRS

v.

INDUSTRIAL COMMISSION et al. (No. 12309.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"BUSINESS OF MAINTAINING BUILDINGS."

One who was engaged in no other business than the managing, maintaining, and keeping in repair some 12 or 15 buildings, all, except 1 or 2 owned by his children, belonging to him, keeping a foreman for the purpose, was engaged in the "business of maintaining buildings" within Workmen's Compensation Act, § 3 (b), subd. 1.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—MATTERS REVIEWABLE—SAVING OBJECTIONS.

In a proceeding under the Workmen's Compensation Act, an objection, that the employee made no claim for compensation within six months after the accident, cannot be raised for the first time in the Supreme Court on review of a judgment of the circuit court affirming an award.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

3. MASTER AND SERVANT—MATTERS REVIEWABLE—RECORD.

On review in the Supreme Court of a judgment affirming an award of the Industrial Commission, the employer cannot claim that an objection, that the employee had made no claim for compensation within six months of the accident, was raised in the court below, merely by showing that the award was attacked below as being "contrary to law" and "contrary to the facts."

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

Error to Circuit Court, Cook County; Charles H. Bowles, Judge.

Proceeding under the Workmen's Compensation Act by Jacob Dier to obtain compensation for personal injuries, opposed by D. W. Storrs, the employer. From a judgment of the circuit court affirming an award made by an arbitrator and confirmed by the Industrial Commission, the employer brings error. Affirmed.

William A. Barnes, of Chicago, for plaintiff in error.

H. J. Rosenberg, of Chicago (Irving Zimmerman, of Chicago, of counsel), for defendant in error.

FARMER, J. This case comes to this court by writ of error to review a judgment of the circuit court of Cook county affirming an award, aggregating $641, made by an arbitrator and confirmed by the Industrial Commission under the Workmen's Compensation Act (Hurd's Rev. St. 1915-16, c. 48, §§ 126-152h) in favor of defendant in error.

It is contended plaintiff in error was not subject to the Workmen's Compensation Act, and also that no claim was made for compensation within six months after the accident.

* Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 267.

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[1] The plaintiff in error was engaged in no other business than the managing, maintaining, and keeping in repair some 12 or 15 buildings, most of which belonged to him. One or two belonged to members of his family. For this purpose he employed a man named Miller as foreman, who had authority to employ men to help him and to direct them in the performance of their work. All wages were paid by plaintiff in error. Miller testified he had worked for plaintiff in error more than 12 years, and that plaintiff in error also employs one or two painters. On August 16, 1915, defendant in error was at work under Foreman Miller painting and calcimining one of plaintiff in error's buildings. The building was a residence two stories high, stone front, with basement. In the course of his employment he received an injury to one eye which destroyed the sight.

Every employer enumerated in subdivision 1 of paragraph (b) of section 3 (section 128) is conclusively presumed to be subject to the act unless he elects to the contrary. Plaintiff in error made no election. Among the occupations, enterprises, or businesses enumerated in paragraph (b) are "the building, maintaining, removing, repairing or demolishing of any structure, except," etc. If plaintiff in error was subject to the act, it was because he was engaged in the occupation or business of maintaining buildings. He looked after renting the property and collecting the rent, and for the purpose of keeping it in good condition he had a regularly employed foreman and also employed such other help as was needed. He engaged in no work of any kind for others and was not a contractor or builder. All he did was look after and care for his property and that of his children. Lexicographers define "maintain": "To hold or keep in any particular state or condition; in a state of efficiency or validity; to keep up." It would seem clear that plaintiff in error was engaged in the business or occupation of maintaining buildings within the usual and ordinary meaning of that term. If he had not been the owner, but had contracted to look after, maintain, and keep in repair the buildings for other owners, from whom he received compensation for his services, it could not reasonably be disputed that his business or occupation would come within the act. The fact that he was the owner and received his compensation from rents of the properties we think cannot relieve him from liability under the provisions of the Workmen's Compensation Act. The case here does not present the same question presented in Uphoff v. Industrial Board, 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1. What was held in the Uphoff Case was that the building of a shed or other structure by an owner who is engaged in another enterprise, occupation, or business does not bring him within tht legislative intent of the act. In Johnson v. Choate, 284 Ill. 214, 119 N. E. 972, it was held that the erection, maintaining, or repairing of a dwelling house by the owner, which is not his occupation or business, does not bring him within paragraph (b), but the owner of a large building rented as a lodge room, dance hall, and for offices, whose occupation is maintaining the building, is embraced within the terms of said paragraph. We are of opinion the contention that plaintiff in error was not engaged in an occupation subject to the act cannot be sustained.

[2, 3] The other objection argued in the brief of plaintiff in error is that no claim for compensation was made by the employee within six months after the accident, and Haiselden v. Industrial Board, 275 Ill. 114, 113 N. E. 877, Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496, and Conway Co. v. Industrial Board, 282 Ill. 313, 118 N. E. 705, holding that unless the claim for compensation is made within six months after the accident it will be barred, are relied on. To that contention defendant in error replies: (1) The question is raised for the first time in this court; that it was not raised before the Industrial Commission or before the circuit court and is not now covered by the assignment of error in this court; and (2) the employee, having returned to

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the employment of plaintiff in error after the accident, was entitled, under paragraph (d) of section 8 (section 133), to present his claim for compensation within 18 months after he returned to such employment. Plaintiff in error insists the question was raised before the Industrial Commission in the petition to that body for review, and cites the statements in the petition that "the award is contrary to law," and "the award is contrary to the facts," in support of his claim. It is also claimed the question was raised in the circuit court by the motion to quash the return of the Industrial Commission. There is nothing in the abstract to indicate that the fact no claim was made within six months after the accident was raised before the Industrial Commission or in the circuit court. It is not sufficient that the question might have been raised under the general statement in the petition or the motion to quash that the award was contrary to the law and the facts. The opinion of the Industrial Commission contains a review of the facts and the commission's conclusions on the facts and the law, but no reference is made to any question having been raised that the claim for compensation was not made in time. The commission does refer in its opinion and findings to the other question raised that plaintiff in error was not subject to the act, and whether the circuit court's attention was called to the point now urged that the claim was not made within six months does not appear from the record. So far as disclosed by the record, the question is raised in this court for the first time. The objection is one that might be waived and must be held to have been waived by not being specifically raised below, and it is too late to raise the objection now for the first time. American Milling Co. v. Industrial Board, 279 Ill. 560, 117 N. E. 147; Chicago Packing Co. v. Industrial Board, 282 Ill. 497, 118 N. E. 727.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

CRESCENT COAL CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12265.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —MEDICAL AND HOSPITAL FEES—DEDUCTION.

Under Workmen's Compensation Act, § 7, providing that payments other than for necessary medical, surgical, or hospital fees shall be deducted from amount payable on death, and section 8, providing that compensation for injury not resulting in death shall include medical, surgical, and hospital fees, not to exceed $200, the master cannot have the excess over $200, voluntarily paid, credited upon the death compensation, in absence of an agreement therefor.

(For other cases, see Master and Servant, Dec. Dig. § 386[2].)

Error to Circuit Court, Peoria County; Clyde E. Stone, Judge.

Application by Tillie Nevitt, administratrix of the estate of John W. Nevitt, deceased, for workmen's compensation, opposed by the Crescent Coal Company, employer. An award was made, which the Industrial

* Decision rendered, Dec. 18, 1918. 121 N. E Rep. 171.

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Commission confirmed, and from a judgment of the circuit court, quashing a writ of certiorari to review the proceedings, the employer brings error. Judgment affirmed.

Weil & Bartley, of Peoria, for plaintiff in error.
J. Frank Lasley, of Peoria (Henson, Gilbert & Helmick, of Decatur, of counsel), for defendant in error.

DUNN, J. John W. Nevitt, an employee of the Crescent Coal Company, was injured in the company's mine on November 22, 1915, and died as a result of the injury on January 7, 1917. He left a widow and children, and, a disagreement having arisen as to the amount of compensation to which his beneficiaries were entitled, an application was filed by his administratrix with the Industrial Commission on March 3, 1917, for an award under the Workmen's Compensation Act. An award was made, which the Industrial Commission confirmed, and the circuit court of Peoria county quashed a writ of certiorari sued out to review the proceedings. A writ of error has been sued out to reverse that judgment.

The right to compensation is not questioned, but plaintiff in error insists that it should have credit for $544.10 paid by it for medical and hospital services and nurses. Section 7 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 132), provides that the amount of compensation to be paid for an injury to an employee resulting in death, if he leaves a widow, child, or children, shall be a sum equal to four times the average annual earnings of the employee, but not less than $1,650 and not more than $3,500, and any compensation payments other than necessary medical, surgical, or hospital fees or services shall be deducted in ascertaining the amount payable on death. Section 8 (section 133) provides the compensation for an injury not resulting in death shall include provision of first aid, medical, surgical, and hospital services, and also medical, surgical, and hospital services for a period not longer than 8 weeks, and not exceeding the amount of $200.

In Butler Street Foundry Co. v. Industrial Board, 277 Ill. 70, 115 N. E. 122, we held that the total amount which is to be awarded for first aid, medical, surgical, and hospital services is $200. The plaintiff in error expended $744.10 for hospital services, nurses, medicines, physicians, and surgeons in caring for the deceased in the illness resulting from his injuries, and no question is made but that the services rendered were necessary, and the amount fair, reasonable, and customary for the services performed. They were rendered with the knowledge and consent of the deceased and his wife, who is the administratrix, and the plaintiff in error insists that they should be regarded as a part of the compensation. It is not claimed, however, that there was any agreement that they should be so held. On the contrary, the widow stated that she was never told that the amounts were to be taken out of the compensation. If the plaintiff in error had paid the amount to the widow with the understanding that it was a part of the compensation, it would have been entitled to a deduction of it from future payments, even though it was also understood that the money was to be used for hospital, medical, and surgical purposes, and for nurses, or if it had paid the bills with the understanding that the amount was to be regarded as a part of the compensation it would have been entitled to a like deduction. The employer, however, is not entitled to a deduction for the payment of such expenses without such agreement. A payment made voluntarily or upon request must be regarded as having been made gratuitously, or in the expectation of saving the life of the employee or reducing his disability, and reducing the total compensation for which the employer would eventually be liable.

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The judgment of the circuit court is affirmed.
Judgment affirmed.
Stone, J., took no part in this decision.

SUPREME COURT OF ILLINOIS.

THEDE BROS. et al.

v.

INDUSTRIAL COMMISSION et al. (No. 12276.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW.

As the Industrial Commission has no jurisdiction to apply the Workmen's Compensation Act to persons not within its provisions, the evidence on the question of jurisdiction may, contrary to the general rule, be reviewed by the courts.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"EMPLOYEE"—"CASUAL."

Under Workmen's Compensation Act, § 5, providing that the term "employee" shall not include any person whose employment is but casual, a carpenter who was temporarily employed as a helper on a transfer wagon held not an employee entitled to the benefit of the act; the term "casual" meaning irregular, etc.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series, Casual; Employee.)

Error to Circuit Court, Peoria County; John M. Niehaus, Judge.

Application by Joseph Marsh under the Workmen's Compensation Act for compensation for injuries received while in the employ of Thede Bros. and David Thede. There was an award in favor of applicant, and a writ of certiorari issued by the circuit court having been quashed, the employers bring error. Reversed and remanded, with directions.

MacChesney, Becker, Angerstein & Rollo, of Chicago, for plaintiffs in error.

Clarence W. Heyl, of Peoria (Heyl & Heyl, of Peoria, of counsel), for defendant in error.

DUNN, J. Thede Bros. and David Thede were engaged in the transfer and storage business in the city of Peoria, and employed many regular teamsters and common laborers who were designated as helpers. Joseph Marsh, who was in their employ, was injured while moving a washing machine, and made application to the Industrial Board for an award for the injury. An award of $270, payable in weekly installments, was made. A writ of certiorari issued by the circuit court was quashed,

* Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 172.

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and this writ of error was sued out to review the judgment of the circuit court.

At the time of the injury section 5 of the Workmen's Compensation Act, provided that:

"The term 'employee' as used in this act shall be construed to mean * * * every person in the service of another under any contract of hire, express or implied, oral or written, * * * but not including any person whose employment is but casual or who is not engaged in the usual course of the trade, business, profession or occupation of his employer." Hurd's Stat. 1916, p. 1274, § 130.

It is claimed by the plaintiffs in error that the employment of Marsh was but casual, and that he was therefore not within the terms of the act.

[1] While the sufficiency of the evidence before the Industrial Commission is not ordinarily subject to review, yet there is an exception to this when the question of the commission's jurisdiction is involved. The Industrial Commission has no jurisdiction to apply the act to persons who are not subject to its provisions, and the evidence certified in the record may be reviewed to determine the question of its jurisdiction. Hahnemann Hospital v. Industrial Board, 282 Ill. 316, 118 N. E. 767.

[2] The plaintinffs in error used 65 wagons in their business, and a man operating each wagon, with helpers only when they had heavy work. They kept regular men employed as helpers, and if they needed extra help for heavy work they picked them up as they found them, sending the extra men out to help on work that they were employed to do. Marsh was employed in this way on May 18, 1917, to help move a heavy furnace. He testified that he had been working as a carpenter for a long time, and on Friday, May 18, 1917, while waiting to see one Mehegan about a job, Thede came along and told him he might make a few dollars while he was doing nothing; that Thede was going to take a furnace out, and that it was heavy work. Marsh testified that it was a pick-up job, and he did not intend to stay there or become a regular employee. Thede asked him to take out the old furnace, and they did not get through with it on that day. Marsh was paid that day for that day's work. He came back the next morning, and the moving of the furnace was completed about 9 o'clock. He was then told to go with the teamster, and they started moving a washing machine, in which operation his hands were caught in the pulley and injured. He was employed for no definite time. He did not intend to become a regular employee and the plaintiffs in error did not intend him to be a regular employee. He understood that the employment was a pickup job, and they so understood it. He was not on the regular pay roll, though the clerk who worked on the pay roll testified that if he had known that Marsh was coming the next day he would have put his name on the pay roll in order to get the money from the bank, as Saturday was pay day. When that day's work was done there was no contract of hire, express or implied, oral or written, between the plaintiffs in error and Marsh, and he would no longer have been in their service, unless he had been again hired for another day or a longer time. In Aurora Brewing Co. v. Industrial Board, 277 Ill. 142, 115 N. E. 207, it was said:

"It would seem, however, that the Legislature intended the word 'casual' to be used as meaning 'occasional,' 'irregular' or 'incidental,' in contradistinction from stated or regular."

Several cases are cited in the opinion illustrative of the circumstances under which an employment should be regarded as casual, and under the principles announced in that case and the cases, cited, the employment of Marsh was not stated or regular, but was casual only.

The judgment of the circuit court will be reversed, and the cause remanded, with directions to quash the proceedings of the Industrial Commission.

Reversed and remanded, with direction.

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SUPREME COURT OF ILLINOIS.

DAVIS

v.

ST. PAUL COAL CO. (No. 12423.)*

LIMITATIONS OF ACTIONS—WORKMEN'S COMPENSATION—AMENDMENT OF PLEADING.

In view of Workmen's Compensation Act, § 1, as to employer electing to come under the act, being relieved of other liability, and sections 2 and 3b, which state conclusive presumption that mine operator is within act, unless he elects otherwise, where injured miner sued, and, when demurrer was sustained to the declaration, amended, after cause was barred, by adding allegation that employer had elected not to come within the act, he could not recover; the original declaration being not merely defective, for the allegation that employer is not covered by the act is essential to the statement of the cause of action at common law.

(For other cases, see Limitation of Actions, Dec. Dig. § 127[14].)

Appeal from Appellate Court, Second District on Error to Circuit Court, La Salle County; Edgar Eldredge, Judge.

Action by John Davis against the St. Paul Coal Company. Judgment for defendant, which was affirmed by the Appellate Court, and plaintiff appeals. Affirmed.

Browne & Wiley and Butters & Clark, all of Ottawa, for appellant.
Duncan & O'Conor, of Ottawa, for appellee.

FARMER, J. Appellant (hereafter called plaintiff) brought an action against the appellee (hereafter referred to as defendant), plaintiff's employer, in the circuit court of La Salle county, to recover damages for a personal injury to plaintiff, alleged to have resulted from the negligence of defendant. The declaration contained two counts and stated a case for a recovery in an action at common law. It contained no allegation that the parties had elected not to operate under the Workmen's Compensation Act (Hurd's Rev. St. 1916, c. 48, §§ 126-152h). Defendant demurred to the declaration, the court sustained the demurrer, and plaintiff asked and was granted leave to amend the declaration. The amendment consisted of inserting in each count an allegation that before plaintiff was injured defendant had elected to not operate under the Workmen's Compensation Act. The injury to the plaintiff was received November 8, 1913. The amendment was filed November 14, 1917. To the amended declaration defendant pleaded the statute of limitations. Plaintiff demurred to that plea, but the court overruled the demurrer. Plaintiff elected to stand by his demurrer, and the court rendered judgment in favor of defendant and against plaintiff for costs. Plaintiff prosecuted an appeal to the Appellate Court for the Second District, where the judgment was affirmed. The Appellate Court granted a certificate of importance and an appeal to this court, and the case is brought to review the judgment of the Appellate Court.

The original declaration stated a cause of action for damages at common law for a personal injury. Defendant was engaged in coal mining, and plaintiff was employed by it in that business. There was no

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cision rendered, Dec. 18, 1918. 121 N. E. Rep. 181.

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averment in the original declaration that the parties had elected not to be bound by the Workmen's Compensation Act. By section 1 (section 126) of that act an employer who elects to provide and pay compensation for accidental injuries to employees is relieved of any liability for damages except as provided in the act. Section 2 (section 127) provides that every employer enumerated in paragraph (b) of section 3 shall be conclusively presumed to be subject to the act, unless he has given notice of his election otherwise, in the manner therein provided. Persons or corporations engaged in "mining, surface mining or quarrying" are engaged in employments which are by said section 3 conclusively presumed to be subject to the act, unless they have elected to the contrary, and section 6 (section 131) provides:

"No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compensation herein provided shall be available to any employee who is covered by the provisions of this act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury."

The action was brought against an employer whom the law conclusively presumes is subject to the Workmen's Compensation Act and who was not liable in a common-law action to an employee for damages for any injury sustained. Plaintiff, by amending his declaration, after the demurred was sustained, so as to allege that the parties had elected not to be bound by the act, impliedly acquiesced in the court's action and amended the declaration so that as amended it stated a case at common law. This was done after the bar of the statute had become complete.

The original declaration did not defectively state a cause of action, which might be good after verdict. In Beveridge v. Illinois Fuel Co., 283 Ill. 31, 119 N. E. 46, the declaration alleged the parties had elected not to be bound by the Workmen's Compensation Act, but there was a failure of proof by the plaintiff of that allegation. Discussing the question this court said:

"It was essential, therefore, to the statement of a cause of action for a negligent injury by an employee against his employer, that it should appear that the employer was not covered by the provisions of the act. A declaration which fails to state a fact whose existence is necessary to entitle the plaintiff to recover does not state a cause of action. Walters v. City of Ottawa, 240 Ill. 259 [88 N. E. 651])."

That decision is conclusive of the question here involved, and it requires no further discussion, unless we were of opinion that decision was erroneous. We entertain no such opinion, but are satisfied with its soundness and must adhere to it.

This question was not squarely passed upon in Zukas v. Appleton Manf. Co., 279 Ill. 171, 116 N. E. 610, and in Barnes v. Illinois Fuel Co., 283 Ill. 173, 119 N. E. 48; but what was said in those cases clearly indicates the view of the court was in harmony with the rule laid down in the Beveridge Case, and is in no way in conflict with that case.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

LEFENS et al.

v.

INDUSTRIAL COMMISSION et al. (No. 12162.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—COMPETENCY.

In proceedings under the Workmen's Compensation Act to recover for the death of an employee, killed by falling down a stairway, evidence that deceased was habitually intemperate was incompetent, where there was direct testimony that he was sober at the time of the accident.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES "ARISING OUT OF EMPLOYMENT."

An employee so drunk and helpless that he can no longer follow his employment is not engaged therein, and an injury received while in such condition does not arise out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—QUESTIONS OF FACT.

As to whether an employee, killed by falling down a stairway, was intoxicated, is a question of fact, in proceedings under the Workmen's Compensation Act, where the evidence is contradictory, and will not be reviewed.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW.

In a proceeding under the Workmen's Compensation Act, it is the duty of the arbitrator, the committee of arbitration, and the Industrial Commission fairly and impartially to consider and weigh all evidence presented, and make their findings in accordance with the preponderance of the evidence, and their conclusions on questions of fact, based on conflicting evidence, are not subject to review.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by William J. Bowe, administrator of the estate of Andrew Erickson, opposed by Marie Lefens and others, employers. Claimant was awarded compensation, and a writ of certiorari by the circuit court was quashed, and the employers bring error. Affirmed.

F. J. Canty, J. C. M. Clow, and George D. Anthony, all of Chicago, for plaintiffs in error.

Augustine J. Bowe, of Chicago, for defendants in error.

DUNN, J. The plaintiffs in error are the owners of the Teutonic Building, in Chicago, and Andrew Erickson was in their employ as a

*Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 182.

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janitor, having to attend to the fifth, sixth, and seventh floors. On January 17, 1917, he was found at the bottom of the stairs of the sixth floor with a fractured skull, from which he died. On the application of his administrator an award was made under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) against the plaintiffs in error. A writ of certiorari issued by the circuit court was quashed, and this writ of error was sued out.

Mrs. Erickson, the widow, testified that she came to the Teutonic Building about 6 o'clock in the evening, and the deceased came a little later. They went to the seventh floor, where he took off his clothes and dusted the hall and steps for a few minutes, while she went to the other side. He had a dust cloth with him and went downstairs, and the next thing she knew she heard him fall. She went downstairs, and found him lying on the sixth floor, and picked him up. There was no one on the sixth floor, and she was alone on the seventh floor, and he was sober.

[1] The plaintiffs in error sought to prove Erickson's habits as to sobriety or drinking, and insist that they had a right to prove that he was habitually intemperate; but the arbitrator refused to hear the evidence. It was incompetent, for direct testimony that a person was sober at a particular time is not contradicted by evidence that he is in the habit of drinking or becoming intoxicated.

[2, 3] Several witnesses testified that Erickson was drunk when he came to the building, and it is contended by the plaintiffs in error that the accident arose out of his intoxication, and not out of or in the course of his employment, and they argue that the preponderance of the evidence is that he was drunk when he came to the building. We said in Hahnemann Hospital v. Industrial Board, 282 Ill. 316, 118 N. E. 767, that an employee so drunk and helpless that he can no longer follow his employment cannot be said to be engaged in his employment, and an injury received while in that condition does not arise out of his employment. The condition of the deceased as to his intoxication was a question of fact, on which the evidence was contradictory, and we are authorized to examine the record for errors of law only. Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976.

[4] It is the duty of the arbitrator, the committee of arbitration, and the Industrial Commission fairly and impartially to consider and weigh all the evidence presented to them, and make their findings in accordance with the preponderance of the evidence. Their conclusions on questions of fact, based upon conflicting evidence, are not subject to review. Mrs. Erickson's testimony fairly tends to show that the deceased was sober, and received his injury while engaged in the performance of his duties. It is not within our province to consider the weight of the evidence to the contrary.

Judgment of the circuit court is affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

DIETRICH

v.

INDUSTRIAL BOARD et al. (No. 12300.)*

MASTER AND SERVANT — WORKMEN'S COMPENSATION — The Child Labor Law, the Women's Ten Hour Law, the Health, Safety, and Comfort Act, and a city ordinance requiring persons conducting meat markets to take out licenses, and imposing penalties for false weights, do not bring an employer conducting a store and butcher shop within the Workmen's Compensation Act by reason of section 3, cl. 8, applying the act to persons engaged in enterprises in which statutory or municipal ordinance regulations are imposed for the protection of employees.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Error to Circuit Court, Peoria County; John M. Niehaus, Judge.

Proceedings under the Workmen's Compensation Act by Esther W. Dietrich to recover for the death of her husband, George L. Dietrich, opposed by Grant Furry, employer. The refusal of an award was affirmed, a writ of certiorari was quashed on defendant's motion, and claimant brings error. Affirmed.

R. H. Lovett, L. O. Eagleton, and Howard White, all of Peoria, for plaintiff in error.

Bailey, Miller, McCormick & Radley, of Peoria, for defendant in error.

DUNN, J. George L. Dietrich was an employee of Grant Furry, and in the course of his employment on November 15, 1915, received an injury in consequence of which he died a few days later. He left a widow, Esther M. Dietrich, who applied to the Industrial Board for an award under the Workmen's Compensation Act. An arbitrator was appointed, and his finding was that Dietrich and Furry, his employer, were not on the day of the accident operating under the provisions of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). On a petition for review the Industrial Board affirmed the finding of the arbitrator, and the applicant sued out of the circuit court of Peoria county a writ of certiorari. On motion of respondent the writ was quashed, and the applicant has sued out a writ of error to review the judgment of the circuit court.

At the time of the accident Grant Furry was engaged in conducting a retail grocery store and butcher shop in the city of Peoria and in connection with the butcher shop buying and selling poultry, dressed and live. The business was conducted in a one-story building, under which was a cellar where the reserve stock of goods was stored. No power-driven machinery was used in connection with the business, although a meat grinder and a coffee and spice grinder, both hand-driven, were used. The deceased was employed as a butcher. His duties consisted in carving, wrapping and selling meats. He also acted as a general handy man about the store and butcher shop, selling groceries and helping to store the surplus stock in the cellar, bringing up supplies from the cellar to the

* Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 226.

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butcher shop and store, and doing repair work to the building, toilets and fences. On November 15, 1915, while assisting in storing in the cellar cans of lard packed in crates, which were let down from the street by means of a chute, his thumb was accidentally crushed, and from blood poisoning resulting from this injury he died on November 24, 1915.

Furry had not elected either to be bound or not to be bound by the provisions of the Workmen's Compensation Act, but the plaintiff in error insists that he was bound by its provisions by reason of clause 8 of section 3 of the act, because he was engaged in an enterprise in which statutory or municipal ordinance regulations are imposed for the protection and safeguarding of the employees or of the public therein. The statutory and municipal ordinance regulations which the plaintiff in error contends bring the defendant in error within the provisions of the act are the Child Labor Law (Hurd's Rev. St. 1917, c. 48, §§ 20 to 20o), the Women's Ten Hour Law (Hurd's Rev. St. 1917, c. 48, §§ 121-125), the Health, Safety, and Comfort Act (Hurd's Rev. St. 1917, c. 48, §§ 89 120), and an ordinance of the city of Peoria which requires every person conducting a meat market to obtain a license to do so and imposes penalties for false weights or sales without weighing, the application for which license must be accompanied by a certificate from the commissioner of health stating that the place in which it is proposed to carry on such business is in a sanitary condition and is a fit place for carrying on such business. These statutory and municipal regulations are not of the character referred to in clause 8 of section 3 of the Workmen's Compensation Act. The title of that act is:

"An act to promote the general welfare of the people of this state by providing compensation for accidental injuries or death suffered in the course of employment within this state," etc.

Compensation for accidental injuries or death is the subject of the act and its language must be construed with reference to that subject. When it is said that it shall apply in any enterprise in which statutory or municipal ordinance regulations are imposed for the protection and safeguarding of the employee or the public therein, it refers to such regulations for the protection and safeguarding of employees or the public against accidental injuries or death. The ordinance and the statutes upon which the plaintiff in error relies are not imposed upon the business in which the defendant in error was engaged for such purposes. So far as they refer to machinery and the guarding, protecting and operating of it they are not applicable to his business, for he had no machinery. The only regulations in those statutes or in the ordinance concerning his business refer to sanitation, the age of children who may be employed, the manner of their employment, the hours of work of women whom he may employ, the provision of seats for them, the maintenance of equable temperature and proper sanitation, and the like. They have no reference to the subject-matter with which the Workmen's Compensation Act is concerned.

The judgment is affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

SMITH-LOHR COAL MINING CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12252.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION.

Under Workmen's Compensation Act, § 7 (a), a wife can claim support if the husband was under legal obligation to support her, although the spouses were not living together at the time, and the wife was not dependent on him for support.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW.

Where the Industrial Commission made an award under the Workmen's Compensation Act for the death of a servant, the courts in their review are restricted to a determination whether there is any evidence to show that the death arose out of and in the course of the servant's employment.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE.

The fact of injury or death of a servant and that it occurred in connection with his employment so as to merit an award under the Workmen's Compensation Act may be shown by circumstantial evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —COURSE OF EMPLOYMENT—EVIDENCE.

In a proceeding under the Workmen's Compensation Act for an award for the death of a coal miner, *held*, that there was evidence tending to show that the death arose out of and in the course of the employment, and thus to sustain an award.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISTRIBUTION OF AWARDS.

Under Workmen's Compensation Act, § 7 (f), and in view of paragraphs (a), (b), (c), *held* that, if compensation is fixed by the Industrial Commission, it is required to determine who is entitled to it before determining the amount, the provisions as to distribution by the porbate court, applying only to cases where the employer makes voluntary payment to the administrator.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to Circuit Court, Christian County; J. C. McBride, Judge.

Application by Mayme Jones, administratrix of William D. Jones, for compensation under the Workmen's Compensation Act against the Smith-Lohr Coal Mining Company, the employer, for the death of her intestate, in which S. A. Jones and Elizabeth Jones, parents, filed an intervening

* Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 231.

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petition. The Industrial Commission reversed the determination of the arbitrator and rendered an award against the employer, and in favor of the administratrix as widow, and upon the employer's petition for certiorari the circuit court confirmed the award and entered judgment thereon, and, the case having been certified as one proper to be heard by the Supreme Court, the employer brings error. Affirmed.

Charles C. Le Forgee, George W. Black, and Thomas W. Samuels, all of Decatur, for plaintiff in error.

Griffith & Vogelsang, and McDavid & Monroe, of Decatur, for defendants in error S. A. Jones and E. Jones.

Charles E. Springstun, of Pana, and W. B. McBride, Taylorville, for defendant in error Mayme Jones.

FARMER, J. William D. Jones, an employee of the Smith-Lohr Coal Mining Company, the plaintiff in error, died in the mine of the plaintiff in error, and while in its employ, shortly after noon on the day of September 26, 1916. Mayme Jones, claiming to be his widow, was appointed administratrix of his estate, and filed an application for an adjustment of claim with the Industrial Commission, stating that the deceased came to his death while in the employ of the plaintiff in error. S. A. Jones and Elizabeth Jones, parents of deceased, filed an intervening petition, claiming they, and not the widow, were entitled to an award under the act. The cause was heard by an arbitrator, where it was agreed that both decedent and plaintiff in error were subject to the provision of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) on the day of decedent's death, and if there was any liability at all it was for $3,500. Upon the hearing before the arbitrator Mayme Jones contended she was entitled to an award under the act as the widow of decedent, whom he was under obligation to support. The parents claimed Mayme Jones was not the widow of decedent, having never been legally married to him, that decedent was under no legal obligation to support her, and that she was living separate and apart from him at the time of his death without his fault.

[1] Paragraph (a) of section 7 of the act in force at the time the death occurred provided for the payment of compensation to any widow, child, or children whom the deceased was under legal obligation to support, and we have held it is not required that the husband and wife be living together at the time or that she be dependent upon him for support. It is sufficient if the husband was under legal obligation to support the wife. Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 855. The parents contended they were entitled to an award as surviving parents, to whose support decedent had contributed within four years next preceding his death. Both the widow and the parents contended decedent's death arose out of and in the course of his employment. The arbitrator found that decedent's death was due to natural causes, and not to an accidental injury arising out of his employment, and denied an award. Petitioners submitted the case for review to the Industrial Commission, which, on the same evidence heard before the arbitrator, set aside the decision of the arbitrator and rendered an award of $3,500 against plaintiff in error and in favor of the widow. Upon a petition for certiorari the circuit court of Christian county reviewed the decision and award of the Industrial Commission, confirmed the same, and entered judgment thereon. The circuit court certified the case was one proper to be heard by this court, and the case comes to this court for review by writ of error.

Plaintiff in error urges as grounds for reversal: (1) That the evidence does not prove the decedent's death was the resut of an accidental injury arising out of and in the course of his employment; and (2) that neither the widow nor the parents of decedent established the required relationship and dependency under the act to entitle either to compensation.

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The widow and the parents were represented by different counsel in the hearings had before the arbitrator, the Industrial Commission, and in the circuit court, and they have filed sparate briefs in this court. Both urge liability under the act, and each contends that they alone are entitled to the compensation. Counsel for the parents also ask a construction of the Workmen's Compensation Act as to whether that act requires a determination by the Industrial Commission as to whom is entitled to the award, or if that question should be left to be determined by the probate court when distribution is made of the award.

[2-4] In discussing the first contention of plaintiff in error it will be necessary to review the evidence, not to pass upon its wieght, but to see if there is any evidence tending to show that the death arose out of and in the course of decedent's employment. Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179, 115 N. E. 834; Big Muddy Coal & Iron Co. v. Industrial Board, 279 Ill. 235, 116 N. E. 662. The fact of the injury or death and that it occurred in connection with the employment may be shown by circumstantial evidence. Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149.

Decedent had been in the employ of plaintiff in error in its mine for several years. At the time of his death his duties consisted of operating a motorcar in the south entry of plaintiff in error's mine. He hauled empty cars from the bottom of the shaft south through the south entry for a mile or more, and then east for about one-half a mile to a place called the "parting," where there was a switch track. He would there leave his string of empty cars and haul a string of loaded cars back to the bottom of the shaft, returning the same way he came. There was but a single-track railway in said entry, and it is from 1¼ miles to 2 miles from the bottom of the shaft to the place called the parting. The motorcar operated by deceased had a trolley pole extending from the car to a trolley wire along the west side of the south entry. There was a seat on the motorcar for the motorman and a headlight on each end of the car. When a string of empty cars was taken from the shaft to the switch or parting, the motorman, by using a lever for that purpose, could cut off the cars from the motorcar, and they would be switched onto a track to be loaded, and the motorcar would go on the track where loaded cars stood, couple on to said cars, and haul them back to the shaft. A man stayed at the switch or parting for the purpose of throwing the switch. Decedent had made several trips of this character the forenoon of the day of his death. After lunch on the day of his death he started from the shaft with a string of some 15 empty cars for the parting. Two employees of plaintiff in error were standing at the switch or parting ready to throw the switch. They saw deceased coming with his string of cars, and noticed something was wrong; for, instead of slackening the speed of the cars and detaching the cars from the motorcar, he came on at a fast rate of speed—so fast that the switch could not be thrown, and the string of empty cars ran into the string of loaded cars, causing several to be derailed and coal to be thrown all around. Decedent did not have hold of the controller, and was paying no attention to his train, but had his head and arms resting on the controller, and appeared to be either unconscious or dead. When the men at the switch reached deceased after the collision, he was in the same position and was dead. He had two slight scratches on his face, and his neck was broken. His cap was later found about a mile from the parting, on the floor of the entry, and the lamp on his cap was still burning. Upon an examination of decedent's body no other marks or other signs of physical injury were apparent except an indentation on the face, apparently caused by the pressure of his face against the controller. The roof of the entry through which the string of cars passed was at the lowest place about 65 inches from the rail, or about 3½ feet above the decedent's seat as motorman. This point was 75 feet north of where decedent's cap was found and about a mile

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from the parting. One of the men who was at the parting at the time of the accident testified that a motorman at times had to stand up to see if his string of cars was running along all right.

Two doctors examined the body some four or five hours after the accident, and, while neither expressed an opinion as to how or when decedent's neck was broken, one of them testified some necks are easily broken, and that a man's neck might be broken by coming in contact with a flat surface without the skin being broken if at the place of the blow there was sufficient protection. The two doctors testified that, assuming decedent's head was resting on his hands or arms at the time his train of cars ran into the loaded cars, the shock of the collision would not, in their opinion, have been sufficient to have broken his neck.

It is the theory of plaintiff in error that deceased died from natural causes on his way from the bottom of the shaft with the train of empty cars to the place where he was to leave them and take loaded cars. Deceased had complained that day of not feeling well, and did not eat his lunch. It was shown that he indulged in drinking intoxicating liquor, some witnesses testifying he would drink until intoxicated, while others testified that he did not drink excessively and that they had never known him to be intoxicated. There was a depression or indentation in the skin of the face of deceased, which remained after he was taken out of the mine and turned over to the undertaker. The undertaker and physicians testified that in their opinion this indentation was caused by the face resting on some hard substance after death. There is no dispute that deceased's neck was broken, and the evidence tends to rebut the theory that this occurred when the motorcar came in collision with the loaded cars. The proof warrants the inference that deceased's neck was broken before that time, and the further inference that this was the cause of his death. There is no direct evidence just how the neck came to be broken. The most reasonable inference from the testimony is that while the cars were moving deceased's head came in contact with the roof of the mine. This could easily have occurred by his rising from his seat to look after his train of cars at a point where the roof was lowest, and it was not far from a low point or place in the roof that his cap was found. The finding of the cap would warrant the conclusion that deceased's head came in contact with something which knocked the cap off his head. Plaintiff in error contends that, if this had occurred, there would have been physical evidences on the head where it came in contact with the roof. There was medical testimony that a cap might be sufficient protection to prevent this, and that the necks of some men are more easily broken than the necks of others. While the evidence is by no means conclusive, it fairly tends to prove that the death resulted from an accident arising out of and in the course of the employment.

[5] Mayme Jones testified she was the widow of William D. Jones, the deceased, and put in evidence a certificate of her marriage with him. She had been previously married to a man by the name of Dobbs, and it is insisted it was not shown that Dobbs was dead or that she had ever been divorced from him. She claims the award on the ground that she is the widow of deceased and entitled to his support. There were no children of the marriage. The parents of William D. Jones claim that the widow was living separate and apart from her husband before and at the time of his death, and that he neither supported nor was under legal obligation to support her. They claim the award on the ground that the deceased had contributed to their support within four years previous to his death. It is stated in the brief of their counsel that it was the view of the circuit court that which of the claimants was entitled to the award was a question to be determined by the probate court that appointed the administratrix. The award made was within the limits fixed by statute in such cases whether the widow or the parents were entitled

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to it. Paragraph (f) of section 7 of the Workmen's Compensation Act, in force at the time of the death, reads as follows:

"The compensation to be paid for injury which results in death, as provided in this section, shall be paid at the option of the employer either to the personal representative of the deceased employee or to his beneficiaries,and shall be distributed to the heirs who formed the basis for determining the amount of compensation to be paid by the employer, the distributees' share to be in the proportion of their respective dependency at the time of the injury on the earnings of the deceased: Provided, that, in the judgment of the court appointing the personal representative, a child's distributive share may be paid to the parent for the support of the child. The payment of compensation by the employer to the personal representative of the deceased employee shall relieve him of all obligations as to the distribution of such compensation so paid. The distribution by the personal representative of the compensation paid to him by the employer shall be made pursuant to the order of the court appointing him." Hurd's Stat. 1916, p. 1275.

The statute authorizes the employer, at his option, to pay the compensation provided by section 7 either to the personal representative of the deceased or to his beneficiaries, to be distributed to the heirs who formed the basis for determining the amount of the compensation. The payment to the personal representative of the deceased employee, the statute provides, shall relieve the employer of all responsibility for the distribution of the compensation so paid, and the distribution by the personal representative shall be made pursuant to the order of the court appointing him. In our opinion, the statute as to distribution of the amount paid by the employer to the personal representative of the deceased applies only in cases where the employer voluntarily pays the compensation to the personal representative of the deceased without a hearing and determination before an arbitrator or the Industrial Commission. If the compensation is fixed by the Industrial Commission, it is required to determine who is entitled to the compensation before it can determine the amount; for, if the persons or classes described in paragraphs (a) and (b) of section 7 are entitled to the award, the amount to be awarded is different from the amount authorized by the other paragraphs of said section. Here an administratrix of the deceased employee was appointed, and, no payment having been voluntarily made by the employer, the proceeding authorized by the statute for compulsory payment was instituted. No one could doubt that, if the contesting claimants for the award were the persons embraced in paragraphs (a) and (c), the amount of the award could not have been determined without determining the persons who were entitled to it. The fact that the claimants were the persons described in paragraphs (a) and (b), under which paragraphs the amount of the compensation provided is the same, could not operate to relieve the Industrial Commission from the duty of determining the person or persons who were entitled to the compensation. We do not construe the statute in such cases as this to leave it to the probate court to determine who is entitled to the award made by the Industrial Commission.

[6, 7] Mayme Jones testified on her first examination, in her own behalf, that she was married to deceased, William D. Jones, May 20, 1914, and produced and offered in evidence the marriage certificate. On cross-examination by counsel for plaintiff in error she testified she had left her husband about four months before he died, during which time she lived with her mother in East St. Louis; that she had left her husband temporarily. On cross-examination by counsel for the mother and father of deceased Mayme Jones testified she was married to Francis Dobbs in St. Louis in 1908 and lived with him about a year. They had no children. She was not living with Dobbs at the time of his death, which she testified occurred before she was married to deceased, and that she and Dobbs were never divorced. Nancy Elizabeth Jones, mother of deceased, called

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as a witness in her own behalf, testified her son and Mayme Jones lived at her house about five months after their marriage; that Mayme Jones then went back home and stayed some time, and on her return she and deceased lived in another house. They separated twice before the death of decedent. Mayme Jones was recalled by her counsel to testify as to the correctness of certain statements attributed to her by other witnesses who had testified on the hearing. On cross-examination by counsel for decedent's parents she testified she learned of her first husband's death through his relatives living in East St. Louis, and that she had no other information of his death. She further testified that she was confused when she said she had never been divorced from her first husband when she was first on the witness stand. She testified she was divorced from him about 1908, which was after she had heard he was dead; that the divorce was procured at the courthouse in East St. Louis, in which city she was living at that time. She could not remember her attorney's name, but said the judge's name was Flanningan. This testimony not only was not objected to at the time, but it was developed and brought out by counsel who now object to it as incompetent to prove the divorce. They cannot now be heard to raise that objection. Goelitz Co. v. Industrial Board, supra.

The Judgment of the circuit court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

WELLS BROS. CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12254.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —DUAL COMPENSATION.

Under Workmen's Compensation Act, § 8, par. c, a workman so injured as to be entitled to compensation under pars. d, e, or f, may, if disfigured, also have compensation under par. c.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —APPEAL—SCOPE OF REVIEW.

On writ of error to review judgment confirming award of workmen's compensation, the employer cannot attack basis of award on ground not presented before the commission or the trial court.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION —HARMLESS ERROR.

Where servant claimed total disability, and the only evidence showed such disability, the employer could not complain that award for partial disability was excessive.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

* Decision rendered, Dec. 18, 1918.. 121 N. E. Rep. 256.

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Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding by Luke Hallerin for workmen's compensation, opposed by Wells Bros. Company, employer. To review judgment confirming award of Industrial Commission for the employee, the employer brings error. Affirmed.

J. C. M. Clow, of Chicago, for plaintiff in error.
Le Bosky & Levine, of Chicago, for defendant in error.

CARTER, J. This cause comes to this court on a writ of error sued out by plaintiff in error to review the judgment of the circuit court of Cook county, that court having certified that the case was one proper to be reviewed here.

On July 24, 1916, while Luke Hallerin was working for the Wells Bros. Company in a well or caisson at Kinzie and Dearborn streets, in Chicago, about 90 feet below the surface, there was an explosion of gas in the caisson, whereby Hallerin's head, neck, arms, hands, and face were burned. His nose was scarred on both sides and its size diminished at the end, and his upper and lower lips were also scarred in such manner that the shape of the mouth has been altered. As the result of these burns, his face and head are seriously and permanently disfigured. His hands and fingers were also burned and disfigured, and it is claimed by counsel, and the evidence tended to show, that he is completely and permanently disabled. It was agreed on the hearing that both parties were under the Workmen's Compensation Act, and that the injuries resulted from an accident which arose out of and in the course of Hallerin's employment. He was allowed as compensation, under paragraph (c) of section 8 of the Workmen's Compensation Act, for serious and permanent disfigurement $11.56 per week (one-half his weekly wage) for a period of 77 weeks, and was also allowed $6 per week for 314 weeks for permanent partial incapacity resulting from his injuries. On the case being taken to the circuit court, the findings of the Industrial Commission were approved.

The only question raised here by counsel for the plaintiff in error is that Hallerin is not entitled to compensation both for disfigurement and for partial disability under paragraph (c) of section 8 of the Workmen's Compensation Act. As amended in 1915 that paragraph reads:

"For any serious and permanent disfigurement to the hand, head or face, the employee shall be entitled to compensation for such disfigurement, the amount to be fixed by agreement or by arbitration in accordance with the provisions of this act, which amount shall not exceed one-quarter of the amount of the compensation which would have been payable as a death benefit under paragraph (a), section 7. * * * Provided, that no compensation shall be payable under this paragraph where compensation is payable under paragraph (d), (e) or (f) of this section: And, provided, further, that when the disfigurement is to the hand, or face as a result of an injury, for which injury compensation is not payable under paragraph (d), (e) or (f) of this section, compensation for such disfigurement may be had under this paragraph."

In Stubbs v. Industrial Board, 280 Ill. 208, 117 N. E. 419, this court held that under the Workmen's Compensation Act of 1913 there could be no award for disfigurement under paragraph (c) of section 8 and also for permanent partial incapacity. Paragraph (c) of the act read the same then as it does now with the exception of the second proviso, commencing, "And provided further," which was added by amendment in 1915 (Laws of 1915, p. 403).

[1-4]Counsel for plaintiff in error concedes that paragraph (c) of section 8 has been amended since it was construed in Stubbs v. Industrial Board, supra, but contends that adding the second proviso in no way modifies or changes the meaning of said paragraph as it was construed by

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this court before such addition. He argues that this second proviso does no more than set out in specific words what would necessarily be inferred from the provisions of said paragraph before such amendment. This argument is without merit. To so construe the statute as now amended would leave the second proviso without any meaning. It is the cardinal rule in the construction of a statute that it should be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant; that the statute should be so construed, if possible, that every sentence and word shall be given its ordinary meaning and acceptation. Crozer v. People, 206 Ill. 464, 69 N. E. 489. Paragraph (c) under the law of 1913 provided specifically and clearly that compensation was payable for serious and permanent disfigurement to the head, hands, or face and fixed the amount. The first proviso, as construed in the Stubbs Case, supra, limited the scope of this paragraph by providing that where compensation is payable under paragraph (d), (e), or (f) no compensation should be had for disfigurement. This resulted in the situation that where any compensation at all, no matter how small, was recoverable under paragraph (d), (e), or (f), no compensation could be had for disfigurement. The second proviso added by the amendment of 1915 limits the first proviso in such a way as to cover a case such as we are here considering; that is to say, where a man sustains injuries which disfigure his face or head but do not incapacitate him and at the same time sustains injuries to other parts of the body which do result in disability, then he can recover for both. To say that the last proviso simply sets out affirmatively the inference to be drawn from the first proviso is unreasonable. The intention of the Legislature is the law. Uphoff v. Industrial Board, 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1; Hoyne v. Danisch, 264 Ill. 467, 106 N. E. 341. The Legislature certainly never added this last proviso intending not to give said paragraph any other or different meaning than it had before. The office of the proviso is to qualify what is affirmed in the body of the act, section, or paragraph to which it applies. In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; Lewis' Sutherland on Stat. Cons. (2d Ed.) § 352. The reasonable and natural construction of the act as now amended is that compensation may be awarded if injuries result in permanent partial incapacity, as provided for in paragraphs (d), (e), and (f), but if there are also injuries—not those compensated by paragraphs (d), (e), and (f)—resulting in permanent disfigurement to the hands, head, or face, they may also be compensated for under the second proviso of paragraph (c) of section 8. This being so, there was no error in the Industrial Commission allowing compensation to Hallerin both for disfigurement to the head and face and for permanent partial incapacity resulting from other injuries.

[5, 6] Counsel for plaintiff in error further argues that the evidence before the Industrial Commission furnished no data on which to fix $6 per week as the amount to be allowed for permanent partial disability. We do not think plaintiff in error is in a position, on this record, to raise this question. It is quite clear from the record that the question was not raised before the arbitrator or before the Industrial Commission, and therefore it cannot be raised for the first time before the circuit court or this court. American Milling Co. v. Industrial Board, 279 Ill. 560, 117 N. E. 147, and cases cited. Moreover, on the hearing before the Industrial Commission Hallerin claimed complete disability. If plaintiff in error claimed that he was only partially disabled, that was a matter of defense upon which it should have introduced testimony; but it failed to do so, and therefore, under the reasoning of this court in Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627, that question cannot be raised here. As Hallerin claimed total disability and so testified, and the arbitrator found that he was not completely but only partially disabled and made an award accordingly,

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the error, if any, in the finding, would consist in allowing too little rather than too great an award on this question, as the only testimony in the record tends to show that he was totally disabled. Plaintiff in error cannot be heard to object because the finding against it was for too small an amount. Becker v. People, 164 Ill. 267, 45 N. E. 500.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

METAL STAMPINGS CORPORATION
v.
INDUSTRIAL COMMISSION ET AL. (No. 12250.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW.

Where there is evidence tending fairly to prove that a deceased employee contributed to the support of his parents, etc., so as to entitle them to the compensation under the Workmen's Compensation Act, § 7, the sufficiency of the evidence cannot be reviewed by the courts.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONTRIBUTION TO SUPPORT OF PARENTS.

In a proceeding under the Workmen's Compensation Act, *held*, that there was competent evidence to show that the deceased employee, who was a minor child, had within four years previous to his injury contributed to the support of his parents, so as to sustain in reviewing court an award in their favor under section 7.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —RIGHT OF PARENTS.

To entitle the parents of a deceased employee who died during minority as a result of an injury in the course of his employment to compensation under the Workmen's Compensation Act, § 7, it is not necessary that the contribution of the minor was in excess of his expenses or that the contribution to the parents had any regularity.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT OF PARENTS—"CONTRIBUTES TO SUPPORT OF PARENTS."

It is the duty of parents to support minor children until they reach the age of majority, and a minor child "contributes to the support of its parents" within the Workmen's Compensation Act when it contributes a substantial sum to the support of the family, etc.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Error to Circuit Court, La Salle County; Joseph B. David, Judge. Application by Patrick Mascel and Nellie Mascel under the Work-

* Decision rendered, Dec. 18, 1918. 121 N. E. Rep. 258.

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men's Compensation Act for compensation for the death of John Mascel, their deceased son, against the Metal Stampings Corporation, the employer, in which Ralph A. Green, administrator of the estate of John Mascel, was substituted as applicant. The Industrial Board affirmed the award of the arbitrator, and the employer brought certiorari. The circuit court confirmed the award as corrected, and certified that the cause was one proper to be reviewed by the Supreme Court, and the employer brings error. Affirmed.

MacChesney, Becker, Angerstein & Rollo, of Chicago, for plaintiff in error.

Robert E. Larkin, of Streator, for defendant in error.

DUNCAN, C. J. On December 13, 1915, Patrick Mascel and Nellie Mascel filed an application with the Industrial Board for an adjustment of their claim for compensation for the death of their deceased son, John Mascel, who died as a result of an injury received by him August 18, 1915, while working for the Metal Stampings Corporation, plaintiff in error. Ralph A. Green, administrator of the estate of John Mascel, was later substituted as appellant. A hearing on the application was had before the arbitrator, and an award was made in favor of applicant. On review the Industrial Board affirmed the award of the arbitrator. A writ of certiorari was sued out of the circuit court of La Salle county, and that court, upon stipulation of the parties, fixed the amount of compensation at $4.62 per week for a period of 416 weeks as the correct amount, provided compensation was allowable. The court then entered an order confirming the award as corrected, and certified that the cause is one, in his opinion, proper to be reviewed by this court. This writ of error followed.

[1-4] The only question presented and argued in this case is whether or not the deceased had, within four years previous to the time of his injury, contributed to the support of his parents, so as to entitle them to compensation under the provisions of section 7 of the Workmen's Compensation Act in force in 1915 (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). If there is competent evidence in the record which, standing alone, fairly tends to prove that the deceased had contributed to the support of his parents, as aforesaid, within four years previous to his injury, neither the circuit court nor this court may question its sufficiency, as the question of the sufficiency of the evidence is not for the courts. Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627.

On the day of his injury John Mascel, who was then in his eighteenth year, was working in plaintiff in error's factory with a power-driven drill press used for boring holes in the backs of brushes. The drill made about 3,000 revolutions a minute, and when in operation would become highly heated. A thumb of the deceased was caught under the drill, and a hole was drilled entirely through the nail, bone and flesh thereof. A night or two following the injury the deceased became sick, and his temperature rose to 102 degrees. He was then taken to a hospital, where he died about ten days afterwards. According to the testimony of the physician his death was due to infection from the injury. The deceased worked at the plaintiff in error's factory the last four days in June, 1915, and from thence up to the date of the injury, during which time he had earned $101.92. Of that amount $75.89 was paid to him, and plaintiff in error held out and applied $20 to its claim against his father for money advanced or loaned to the father, and the balance of $6.03 due the deceased was also applied by plaintiff in error to settle a balance due from the father on said advancement to him. During the previous year 1914 the deceased had earned at plaintiff in error's factory $262.94, all of which was by him paid to his mother, Nellie Mascel, and was used in the support of the family, according to the undisputed evidence in the record. He

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also earned in 1913 at plaintiff in error's factory the sum of $32.35, which was also paid to his mother and used for the support of the family. The evidence further shows that the $75.89 paid to the deceased in 1915 by plaintiff in error was all by him turned over to his mother, and was likewise by her used for the support of the family, and that a part of his earnings for 1912 was by him paid to her and by her used in the same manner, but the amount of his earnings in that year and the amount paid to his mother do not appear in the record. The total amount of earnings of the deceased paid to his mother and father and used in support of the family for the years 1913, 1914, and 1915 was $397.21, or an average of $132.40 a year. It is also shown by the record that the deceased's father, Patrick Mascel, was a wage-earner, only receiving for his wages $65 per month, and that during the greater portion of the time that the deceased was earning money for the family in 1915 in plaintiff in error's factory the father was idle and not earning wages, and that during that time the deceased's wages kept up the family, which consisted of the parents and six boys besides the deceased, ranging from 4 months to 18 years of age, the deceased being the eldest. Under this showing the entire family of nine persons required for ther support less than $900 a year, counting all the wages earned by the father and the deceased, or less than $9 per person a month. For the last three years the deceased contributed to this support more than $11 per month, and was away from the family at school during the early part of 1915, where lodging and board, clothing, and expense money, as well as tuition, were furnished to him without cost to himself or any member of his family.

The deceased on January 1, 1915, had commenced college in preparation for the priesthood, and was to study each year until he completed his course; his work and earnings being limited to his vacation periods. Plaintiff in error insists that a fair consideration of the evidence is that the deceased during vacation did some work for which he earned some wages, which were turned over to the parents with the understanding that they were to pay the expenses of his education with that money. This claim is based upon an apparent contradiction in the testimony of Patrick Mascel given at the hearing before the Industrial Board and that given by him before the coroner's inquest. A careful consideration of his testimony at these different hearings convinces us that even his testimony supports the finding of the Industrial Board, and that when he is properly understood his testimony is not conflicting except in a few statements which are unimportant, and the conflicts therein are shown by him to have been caused either by his testimony being misquoted or given by him as the result of a pure mistake on his part. The other evidence in the record amply supports the finding of the board, which is therefore conclusive.

Paragraph (b) of section 7 of the Workmen's Compensation Act aforesaid provides as follows:

"If no amount is payable under paragraph (a) of this section and the employee leaves any widow, child, parent, gradparent or other lineal heir, to whose support he had contributed within four years previous to the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than sixteen hundred and fifty dollars and not more in any event than thirty-five hundred dollars."

Under this paragraph it is not necessary that contributions by a child in support of its parents should be in excess of the child's own cost and expense before the parents would be entitled to recover compensation for his death, as contended by plaintiff in error. It was the duty of the parents to support the deceased until he reached the age of majority, and within the meaning of the statute the child contributes to the support of its parents when it contributes a substantial sum to the support of the family, although that sum is less than the actual cost and expense of its support and maintenance if the child is a minor or is in a condition to

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demand legal support from its parents. It is not necessary that the parents be dependent upon such deceased child or that his contribution to their support have any regularity. Commonwealth Edison Co. v. Industrial Board, 277 Ill. 74, 115 N. E. 158. If it were necessary in this case for the proof to show that the parents were dependent upon the deceased for support or that they were particularly dependent upon him for support—i. e., that his contribution to their support was greater than the cost and expense to the parents for his support—that showing is clearly made in this record for the three years preceding his death.

As the evidence in the record is ample to sustain the finding and award of the Industrial Board, the judgment of the circuit court is affirmed.

Judgment affirmed.

APPELLATE COURT OF INDIANA.

ÆTNA LIFE INS. CO.

v.

SHIVELEY ET AL. (No. 10246.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION AGREEMENTS.

A compensation agreement, entered into under Workmen's Compensation Act, § 57, as amended by Acts 1917, c. 81, § 4, and approved by the industrial board, has the force and effect of an award.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—COMPENSATION AGREEMENT — NECESSARY PARTIES.

In the absence of a rule of the industrial board to the contrary, insurance carrier is not a necessary party to a compensation agreement, under Workmen's Compensation Act, § 57, as amended by Acts 1917, c. 81, § 4, nor to a proceeding looking to its approval by the board, but, where insurance carrier for sufficient causes seasonably petitions to be admitted as a party, it should be admitted and heard.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPROVAL OF COMPENSATION AGREEMENT.

A compensation agreement, under Workmen's Compensation Act, § 57, as amended by Acts 1917, c. 81, § 4, is not binding on the insurance carrier, either before or after its approval, as against a proper proceeding seasonably made, where such agreement is the result of mistake or tinctured with fraud, or characterized by gross irregularity affecting substantial rights, or has no meritorious foundation in fact.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—POWERS OF INDUSTRIAL BOARD.

The industrial board possesses only powers expressly granted, together with those arising from implication because necessary to full exercise of granted powers.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

* Decision rendered, Nov. 27, 1918. 121 N. E. Rep. 50.

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5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FRAUD—BURDEN OF PROOF.

In a proceeding, under Workmen's Compensation Act, § 57, as amended by Acts 1917, c. 81, § 4, by an insurance carrier to set aside an order approving a compensation agreement, the burden is on the insurer to show fraud.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION — MATTERS REVIEWABLE—RECORD.

On appeal from an order of the industrial board, denying a petition of insurance carrier to set aside an order approving a compensation agreement on the ground of fraud, it will be assumed that there was no fraud, where there was no finding on that issue, and the facts found are not sufficient to force an inference of fraud.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PRESUMPTIONS—RECORD.

On an appeal from an order of the industrial board, it will be presumed, in absence of finding to contrary, that there was no rule of the board that hearings regarding approval of compensation agreement be formally set for hearing, and that notice be served on the insurance carrier.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—VACATING ORDER OF APPROVAL OF COMPENSATION AGREEMENT.

Where industrial board's approval of a compensation agreement has been procured by fraud, or is the result of mistake or the like, and, as a consequence, the agreement or its approval has no just foundation upon which to stand, the board in any pending proceeding may determine such fact and annul the order approving the agreement.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHTS OF INSURANCE CARRIER.

Where an insurance carrier has had reasonable opportunity to be heard on the proposition of the approval of a compensation agreement, but has failed to avail itself thereof, its motion to vacate such order should not be entertained unless it clearly excuses the failure.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

10. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—VACATING ORDER OF APPROVAL OF COMPENSATION AGREEMENT.

Before vacating an order approving a compensation agreement, an insurance carrier should be required to make at least an ex parte prima facie case on the merits.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Industrial Board.

Proceedings by Ever M. Shiveley, under the Workmen's Compensation Act, to obtain compensation for the death of her husband, Orestes E. Shiveley, opposed by Shiveley Bros., a corporation, employer, and the Ætna Life Insurance Company. From an order refusing to vacate an

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order approving a compensation agreement between the applicant and the employer, the insurance company appeals. Reversed, with instruction.

J. W. Fesler, Harvey J. Elam, and Howard S. Young, all of Indianapolis, for appellant.

Robert J. Loveland, of Peru, for appellees.

CALDWELL, J. Under the provisions of section 57 of the Workmen's Compensation Act (Acts of 1915, p. 392), as amended (Acts of 1917, p. 228, § 4), there was filed with the industrial board, November 7, 1917, a memorandum of compensation agreement, bearing date of October 27, 1917, executed by appellee Shiveley Bros. a corporation, as employer, and by appellee Ever M. Shiveley, as surviving dependent wife of Orestes E. Shiveley, a deceased employee of such corporation. The memorandum recited the necessary facts to entitle Ever M. Shiveley to an award of a definite amount of compensation under the act and in harmony with the recited facts, and fixed such compensation, including an allowance for burial expenses and doctor bills, in the gross sum of $4,070, to be paid in such installments as should thereafter be determined by the industrial board under the provisions of the act. The memorandum provided also that, pending its consideration by the board, due notice should be given appellant as insurance carrier. November 10, 1917, the board, by one of its members, indorsed its approval on the memorandum.

December 5, 1917, appellant filed with the board its verified petition, naming appellees as defendants thereto, and praying thereby that the approval of the compensation agreement be set aside and the cause heard on its merits. The petition alleged facts to the following effect: That appellant, under the terms of its contract of insurance, and as insurance carrier, was directly liable for any claim that might be awarded on account of the death of Orestes E. Shiveley as an employee of Shiveley Bros.; that Orestes E. Shiveley was not such an employee as is contemplated or embraced by the compensatory provisions of the act; that his death was not the result of a personal injury by accident arising out of and in the course of the employment; and that such compensatory agreement and it approval were the fruits of collusion and fraud on the part of appellees. The petition alleged also that appellees collusively and fraudulently prepared, executed, and filed the memorandum, and caused it to be approved without appellant's knowledge or consent. The petition contained no allegation respecting when appellant discovered that such a memorandum had been prepared, executed, filed, or approved, and no reason was assigned, by the petition or otherwise, why appellant did not more promptly move to annul such approval. Appellee Ever M. Shiveley answered the petition denying the fraud and averring facts at length to meet and overcome its allegations.

The board heard the evidence bearing not only on the question whether the approval of the memorandum agreement should be set aside, but also respecting the merits of the claim, and made a finding of facts in part to the following effect:

The corporate stock of Shiveley Bros. corporation was owned in equal parts by Orestes E. Shiveley, his brother Cortland W. Shiveley, and O. C. Wainscott. The stockholders constituted the board of directors, of which Cortland was president. The corporation operated the principal hotel at Peru.

On and prior to July 24, 1917, the routing of the proposed Range Line Dixie Highway from Indianapolis to South Bend was in contemplation. This highway was to be built in part at the expense of the federal government and in part at the expense of the local municipalities and political subdivisions. A number of cities of north central Indiana were somewhat agitated respecting the route of the highway, each being desirous that the road extend through its confines. Among these cities

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was Peru. A meeting was to be held at Indianapolis July 24, 1917, to consider and determine the route of the highway. As a result of a consultation between Orestes and the president of the hotel corporation, it was arranged that the former should attend this meeting, together with certain other citizens of Peru, that he might use his influence to procure the location of the highway through that city, it being believed that should the highway extend through the city the business of the hotel operated by the company would thereby be materially increased. Thereupon, on the morning of July 24, 1917, a party of 35 citizens of Peru started for Indiapapolis in automobiles for purposes aforesaid. Included in the number was Orestes E. Shiveley, driving his own machine, and carrying three others of the party of his guests. While proceeding on the trip a front wheel of his machine broke down, and as a consequence it overturned, whereby Orestes E. Shiveley suffered severe injuries, resulting in his death in a few hours. His principal object in making the trip was to attend the meeting for the purposes aforesaid. However, theretofore, as manager of the hotel he had cashed several checks for patrons residing in Indianapolis, which checks had been dishonored on being presented for payment. He had these checks with him, and intended, as a secondary or incidental purpose of the trip, to endeavor to collect them.

August 31, 1916, appellant issued to Shiveley Bros. the compensation insurance policy involved in this action, effective from that date, and in force at the time of the death of Orestes E. Shiveley. The estimated annual premium on the policy was $33.43, based on a pay roll estimated as amounting to $8,200, with the provision that at the end of each year appellant should audit the pay roll to determine its actual amount, and that thereupon the insured should pay an additional premium, or that the insurer should return a part of the premium that had been paid, proportional in each case, depending on whether the audit disclosed that the pay roll was more or less than was estimated. September 17, 1917, appellant audited the pay roll for the year ending September 1, 1917, which audit disclosed that for such year it amounted to $6,607 more than as estimated, and therefore collected from the insured an additional premium of $20.78 for that year, paid and received November 24, 1917. In determining such excess of the pay roll over the estimate, the said average weekly wage of Orestes E. Shiveley from September 1, 1916, to the time of his death, July 24, 1917, appearing thereon, was counted as a part thereof.

September 18, 1917, Ever M. Shiveley was informed by Cortland W. Shiveley that she was probably entitled to establish a compensatory claim against Shiveley Bros., based on the death of her husband, and that appellant, as insurance carrier, was primarily liable for its payment. On the same day, at Cortland's suggestion, she executed to Robert J. Loveland, a lawyer, a power of attorney authorizing him to represent and act for her in the matter of such claim. On the same day, by her attorney in fact, she notified appellant, through its local representative, of the facts respecting her husband's death and of her claim to compensation under the Workmen's Compensation Act. Thereupon appellant, representing that it was investigating to determine the question of compensation liability, requested that action in the matter be deferred for two weeks, which request was granted. An additional delay of two weeks was procured by appellant on the representation that it was considering suggesting that the question of compensatory liability be submitted to the board on an agreed statement of the facts. Yet another delay was procured on the representation by appellant's representative that appellant had not fully arrived at a conclusion respecting submitting controverted matter as above indicated.

October 27, 1917, the memorandum of compensation agreement was executed as above stated, appellant not being a party to it. November 6, 1917, claimant, by attorney in fact, mailed to appellant's representative a copy of the memorandum, together with an explanatory letter reciting that

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claimant, at appellant's request, had delayed action for three successive periods, all of which had expired, and that the memorandum was then being forwarded to the board, together with a request for favorable action thereon. The memorandum was filed with the industrial board on the morning of November 7, 1917. At about the same hour appellant, by its Indianapolis representative, received through the mail the copy of the memorandum, together with the explanatory letter forwarded by claimant's attorney in fact the day before. Appellant's Indianapolis office is situated very near the offices of the industrial board. Appellant's representative, on receiving such copy of the memorandum, with the accompanying letter, promptly communicated with the secretary of the board by phone, and informed him that appellant was opposed to the approval of the memorandum; whereupon the secretary informed such representative that the matter was pending before Mr. Hughes, a member of the board, and that objections should be presented to him. No objections to the approval of the memorandum having been presented, the board, by Mr. Hughes, approved it November 10th, as above stated.

The matter of the approval of the compensation agreement was not formally set for hearing, or a time fixed for action thereon, and no notice of any kind was given appellant that, at any fixed time, action would be taken on the question of the approval of the agreement.

Soon after such agreement was approved, appellant, by representative, informed the board that it was objecting to such approval on the ground that Orestes E. Shiveley at the time of his death was not an employee of Shiveley Bros., and that his death was not due to an accident arising out of and in the course of his employment. As we have said, the petition to vacate the order of approval was filed December 5, 1917. At the time of the approval of the agreement the board entered no order fixing the installments in which compensation should be paid.

It is at least impliedly conceded that the finding is in harmony with the evidence. On the votes of Mr. Hughes and Mr. Perkins, Mr. Artman, the third member dissenting, the board denied the petition. Mr. Hughes grounded his vote on his judgment that under the finding decedent, at the time of his injury and death, was an employee of Shiveley Bros., and that his injury and death were due to an accident arising out of and in the course of his employment. Mr. Perkins was of the opinion that decedent was an employee of Shiveley Bros., but he differed from Mr. Hughes on the proposition of decedent's death being due to an accident arising out of the employment. He based his vote on his judgment that under the Workmen's Compensation Act an employer and his employee, or the dependents of the latter, have an absolute right to enter into a compensation agreement without regard to the desires of the insurance carrier, and that the latter is bound by any such agreement so made. Mr. Artman was of the opinion that decedent, under the finding, was an employee of Shiveley Bros. at the time of his injury and death, but that his death was not due to an accident arising out of his employment. He differed from Mr. Perkins respecting the binding effect of a compensation agreement entered into by an employer and an employee or dependents of the latter, in its relation to the insurance carrier of the former. Mr. Artman was of the opinion that an insurance carrier is entitled to be heard on that question. Each member of the board rendered a written opinion disclosing the above facts.

From the finding and the opinions of the respective members of the board, it seems that a consideration of the substantial phases of the claim was rather more potent in the determination of the petition than an inquiry whether such illegality or irregularity attended the execution, filing, and approval of the agreement as required that such approval be annulled on application, if seasonably made, and the cause assigned to be heard on its merits.

The shape in which the record comes to us requires we consider

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three questions: First, the rights of an insurance carrier in such a situation; second, the petition to set aside the agreement; third, the merits of the claim.

[1] The statute upon which the agreement was based is to the effect that an employer and an injured employee, or dependents of the latter in case of his death, may agree respecting compensation to be paid under the act, and that any such agreement becomes binding and enforceable when a memorandum thereof in an indicated form, and harmonizing with the act, is filed with, and approved by, the board. Section 4, Acts of 1917, p. 228, amending section 57, Acts of 1915, p. 392.

An agreement entered into by the parties and approved by the board, pursuant to the terms of the statute, has the force and effect of an award. In re Stone, 117 N. E. 669.

Subject to certain exceptions, every employer operating under the act is required to keep insured his liability thereunder in some association authorized to transact the business of workmen's compensation insurance in this state. Section 68.

The insurer is in all things bound by, and subject to, the awards, judgments, or decrees rendered against the insured. Section 73. The policy of insurance must be construed as the direct promise of the insurer to pay to the person entitled to compensation all benefits awarded under the act. Section 74. All policies of insurance issued under the act must contain a provision that, as between the employer and the insurer, notice to, or knowledge of, the former that a workman has been injured shall be deemed notice to, or knowledge of, the latter. Section 73. In case of an injury to a workman, it is the duty of him or his representative, subject to certain exceptions, to notify the employer of the occurrence in writing. Section 22.

[2] Section 57, neither in its original nor in its amended form, requires that the insurance carrier be a party to an agreement authorized by that section. Neither that section nor any other provision of the act demands that notice of such an agreement or of its approval be served on the insurance carrier. It follows that an agreement executed and approved under that section, or under that section as amended, is binding as between the insurer and the injured party or his dependents, as long as it stands unrevoked, even though such insurer had no actual notice of its execution or approval. If the insurance carrier desires to be notified of the successive steps in the adjustment of a claim, in the absence of a rule of the board on that subject, it must look to the insured to perform that service. We find no provision of the act that prohibits the insurance carrier from exacting from the insured an obligation respecting notice, binding and enforceable as between them. Section 74 seems to contemplate such a notice.

From what we have said, it follows that under the act an insurance carrier was a necessary party to such an agreement as is involved here or to a proceeding looking to its approval by the board. Indeed, the act does not contemplate the insurance carrier as a necessary party to any proceeding before the board involving a claim to compensation. By this statement we mean to say that an injured workman or his representative may file such a claim and push it until it terminates in an award, and in so doing ignore the insurance carrier, without hazarding defeat or embarrassment through an objection that there is a defect of parties.

But, as we have said, the act provides that the policy of insurance contain a stipulation, in effect, that the insurer shall be bound by all awards rendered against the insured, and a further stipulation which must be construed as the direct promise of the insurer to the person entitled thereto that it will pay all installments of compensation that may be awarded or agreed on under the act. Sections 73 and 74.

Under such circumstances it is our judgment that, in all proceedings before the board, the insurance carrier is a proper party, where its in-

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terests are likely to be affected by reason of its obligation under its policy. Moreover, in view of its primary and direct liability as above indicated, it seems to us apparent that where an insurance carrier, for sufficient cause shown, seasonably petitions to be admitted as a party to any such proceeding, the plainest principles of justice demand that it be admitted and heard.

[3] It results from what we have said that the mere fact that an insurance carrier is not a party to the execution of such an agreement as is involved here, or to a proceeding directed to its approval, does not invalidate it even as against such insurance carrier. It does not follow, however, that an employer and an injured employee, or dependents of the latter in case of his death, may, over the opposition of the insurance carrier, bind the latter by such an agreement, regardless of the good faith of the parties of the merits of the involved claim. Where such an agreement is the result of mistake, or is tinctured with fraud, or characterized by gross irregularity affecting substantial rights, or has no meritorious foundation in fact, or the like, we do not regard it as binding on the insurance carrier, either before or after its approval, as against a proper proceeding, seasonably made, to right the consequent wrong.

It has been intimated by this court (In re Stone, 117 N. E. 669), and we now hold, that in any proceeding pending before the board, involving either the determination or the administration of a claim, the board has the power, on the application of any interested party, including an insurance carrier, to vacate its own order, on application seasonably and diligently made, where it appears that any such order is the result of fraud, duress, mistake, gross irregularity, affecting substantial rights, and the like. See the following: Wilcox v. Clarage, etc., Co. (Mich.) 165 N. W. 925; Carpenter v. Detroit, etc., Co., 191 Mich. 45, 157 N. W. 374.

[4] In so holding we recognize that the industrial board is a body created primarily to administer the Workmen's Compensation Act, and that incidentally only it exercises quasi judicial powers. In re Stone, supra; Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

The board possesses only powers expressly granted, together with those arising from implication because necessary to the full exercise of the granted powers. In re Levangie, 228 Mass. 213, 117 N. E. 200.

[5, 6] Directing our attention more particularly to the petition and its disposition, it will be observed that the finding is silent respecting the issue of fraud. The burden of that issue rested on appellant. There being no finding on that issue and the facts found not being sufficient by any means to force an inference of fraud, we are required to consider the case on the assumption of the absence of fraud on the part of appellees in their relation to the agreement and its approval. Raynes v. Staats-Raynes Co., 119 N. E. 809.

[7] There is a finding that the matter of the approval of the agreement was not formally set for a hearing at any definite time, and that no notice was served on appellant that action would be taken on such agreement at any fixed time. We regard these findings as unimportant, in the absence of a rule of the board that such a proceeding must be definitely assigned and notice served on the insurance carrier. In the absence of a finding to the contrary, we must conclude that no such rule exists. For purposes of carrying out the provisions of the act, the board is authorized to make rules not inconsistent with it. Section 55.

[8] The board is not expressly authorized to vacate an order approving such an agreement as is involved here. It is expressly authorized to approve such an agreement, fairly made, and conforming to the act. It necessarily follows that, as an incidental power the board is authorized to determine whether such an agreement was fairly made and whether it does conform to the act. But when the board's approval has been pro-

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cured by fraud, or is the result of mistake or the like, and where as a consequence the agreement and its approval have no just foundation upon which to stand, it seems to us apparent that in any pending proceeding the board, as an incidental power, has a right to determine such fact, and, if found to exist, annul the order approving the agreement. Here the proceeding based on the agreement and its approval was pending before the board, not only for general administrative purposes, but also as indicated by the fact that the board had not entered an order fixing the installments in which compensation should be paid.

[9, 10] We have indicated that under the act a compensation agreement, properly executed by the employer and the employee or dependents of the latter in case of his death, is binding on the insurance carrier, although not a party to it or to the proceeding resulting in its approval. That is to say, the mere fact that the insurance carrier is not a party does not invalidate the agreement or its approval. We have indicated also, however, that the insurance carrier is entitled to be admitted as a party to the proceeding looking to the approval of such an agreement, and also that he may under some circumstances move to vacate such an order. There should, however, be some finality in the action of the board. Where an insurance carrier has had reasonable opportunity to be heard on the proposition of the approval of such an agreement, but has failed to avail himself thereof, his motion to vacate such order should not be entertained unless he clearly excuses the failure. Where he has not had reasonable opportunity to be heard, and has not been heard, or in case of causes subsequently discovered, he should acquit himself of negligence, move with reasonable promptness, or excuse the delay. In any such cases, it occurs to us that, where he claims that the action of the board is the result of error, or has been induced by improper conduct, he should not unreasonably delay action, and in all such cases we believe that he should be required to make at least an ex parte prima facie case on the merits, in order that he may procure the vacating of such an order.

It will be observed that the deductions of the members of the board from the facts found entirely ignore the question whether appellant's diligence was such, in view of its knowledge, as entitled it to be heard respecting the annulling of the order. The negative vote of one member of the board was controlled entirely by his judgment that decedent's dependents were entitled to compensation. The negative vote of another member was grounded solely on his judgment, which we hold to be erroneous, that the employer and employee, or dependents of the latter, have an unqualified right to enter into a compensation agreement, and that the insurance carrier may not challege the result of their action. This member's judgment was that the facts did not establish a right to compensation. The third member's dissenting vote was controlled by his belief that under the facts the right to compensation did not exist, and that an insurance carrier is not bound at all events by such an agreement as is involved here.

Such being the situation, we are impressed that, through inadvertence, this proceeding did not receive that careful consideration that usually characterizes action by the board. Under circumstances such as are presented here, an application to set aside an approval of such an agreement should be considered and determined independent of the merits of the main cause. However, in any such a proceeding, where the applicant aquits itself of negligence and sufficiently excuses delay, an inquiry into the merits is proper to the extent necessary to determine whether there is enough of doubt respecting the validity of the claim to compensation to justify full investigation. If there is no question respecting the right to compensation or its amount, it would be folly to set aside the approval of an agreement, even though delay was excusable and diligence shown.

[11, 12] The application here presented a question primarily for the determination of the board. To some extent it was an appeal to the

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board's discretionary power. It appears affirmatively that the board, in denying the application, did not in fact consider it. It also appears affirmatively that, had it not been for the erroneous views of a member of the board on a legal proposition, the application would not have been denied. We are unable to determine what would have been the fate of the application had it been considered from the proper viewpoint. If we were able to say, as matter of law, that the application should have been denied, then we would have a case where we could say that a proper result was reached, and affirm the action of the board notwithstanding the apparent irregularities. We cannot say as matter of law, however, that a proper result was reached. The application presented a question of fact, and such questions are primarily for the board.

If, from the facts found, we are able to hold, as matter of law, that decedent was such an employee, and the circumstances of his injury and death were such as to entitle his widow to compensation, then also it would appear that a proper result had been reached by the board, though by a procedure somewhat irregular, and it would be our duty to affirm. But we cannot hold, as matter of law, that under such facts the claimant is entitled to compensation. The enterprise in which decedent was engaged at the time of his injury was, at best, but remotely connected with the enterprise in which he was employed. The one was a trip to attend a public meeting; the other was the management of a hotel. It was believed that the location of the highway as desired would result in financial benefit to the hotel enterprise, but it does not appear whether such fact, rather than his general interest in the city of Peru, was the inducing cause of decedent's endeavor to attend the meeting. At any event, it is our judgment that the question of the right to compensation here involves questions of fact which should be determined by the board.

The cause is reversed with instructions to the board to consider, first, the question whether, under this opinion, appellant is entitled to have annulled the order approving the agreement. Should the board be required to consider the cause on its merits, we suggest the following for the consideration of the board: At the time of decedent's injury and death, was he on a mission authorized by the company? Did he, and the proper representatives of the company, believe that such mission might reasonably be expected to result in financial benefit to the latter? That is, did it hold out reasonable prospects that thereby the company's business might be increased? Did the fact of such prospective benefits induce the trip? As bearing on these suggestions, attention is directed to In re Raynes, 118 N. E. 387, and Raynes v. Staats-Raynes Co., 119 N. E. 809.

Dausman, C. J., Batman, P. J., and Ibach and Hottel, JJ., concur.

FELT, J. (dissenting). I am unable to agree with the prevailing opinion of my Associatiates that this cause should be reversed and remanded to the industrial board for further consideration.

It appears that an agreement was duly made awarding compensation and fixing the amount. The agreement was duly approved by the industrial board on November 10, 1917, and stands as an award until duly set aside by such board. Appellant filed its petition on December 5, 1917, to have the approval of the board set aside and the case heard on its merits.

The prevailing opinion states that "on the votes of Mr. Hughes and Mr. Perkins, Mr. Artman, the third member dissenting, the board denied the petition." Such opinion also states that "the board heard the evidence bearing, not only on the question whether the approval of the memorandum agreement should be set aside, but also respecting the merits of the claim." The board, therefore, heard appellant's petition

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to set the approval of the compensation agreement aside, and by the votes of two of its members decided to deny the petition.

An award by agreement of the parties and approval of the board is authorized by the statute and sanctioned by the courts. Acts of 1917, p. 228, § 4, amending section 57 of the Acts of 1915, p. 392; In re Stone, 117 N. E. 669.

So long as an award so made stands, any proceeding before the industrial board relating to the merits of the claim is unauthorized, and in this instance the statements made by the individual members in passing upon the question before them were surplusage, and did not change the effect of their action in denying appellant's petition. City of Pana v. Industrial Board, 279 Ill. 279, 116 N. E. 647.

The prevailing opinion shows that the board did consider the merits of the claim and the right to compensation, in an irregular manner, but the only question properly before it was the one presented by appellant's request to have the approval of the compensation agreement set aside. Both the hearing on the merits and statements made by the members of the board in announcing their decision were foreign to the question properly before the board and actually decided by it as above shown.

The reasons given for decision may or may not be consistent with the decision announced. But, in either event, the reasons given do not change the issue nor render ineffectual the decisions made and duly announced, as in the case at bar.

It is universally held that an erroneous reason given for a decision does not affect the merits or change the binding force and effect of such decision. Terre Haute, etc., R. Co. v. State ex rel., 159 Ind. 438—472, 65 N. E. 401; William v. Hensley School Tp., 175 Ind. 486—492, 93 N. E. 657; Singer Sewing Machine Co. v. Phipps, 49 Ind. App. 116—122, 94 N. E. 793; McDermott v. Burke, 256 Ill. 401, 100 N. E. 168; Gillespie v. Furguson Co., 78 N. J. Law, 470, 74 Atl. 460; Vol. 2, Am. Digest, Appeal and Error, Key-No. 854.

Putting the case in the most favorable light for appellant, its right to a reversal depends upon an affirmative showing that the board abused the discretionary power possessed by it in denying the petition to set aside its approval of the compensation agreement, and thereby deprived appellant of some substantial right.

No abuse of such discretion is shown, but, on the contrary, there appears from the prevailing opinion facts which fully warrant the decision of the board in overruling appellant's petition, and on appeal this is sufficient.

It appears that appellant carried on negotiations looking to an adjustment of the claim; that it procured extensions of time and delayed the adjustment; that when the compensation agreement was made appellant was given a copy of it, with full explanation for the action taken, and was promptly advised of its presentation to the board; that appellant communicated with the board immediately after the compensation agreement was filed with it, knew the agreement was pending for approval of the board three days before the board approved the same, and then after its approval waited 25 days before it filed its petition to obtain a hearing before the board.

The prevailing opinion states that the "situation is such that this court cannot say, as a matter of law, whether or not the petition should have been granted." Conceding this to be true, it in no way obviates the rule that places upon an appellant the burden of showing reversible error, and none is shown in this cause.

The prevailing opinion shows that appellant sought to have the approval of the board set aside solely on the ground of fraud in the making of the compensation agreement and in procuring its approval by the industrial board. Fraud is never presumed, and the party who alleges and relies upon it must prove his allegations or fail. There is no finding

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of fraud which necessarily amounts to a finding against appellant on that vital and controlling issue. I am unable to see anything in the evidence even tending to prove fraud; but, even if a different view may reasonably be taken, it is immaterial here, because appellant has wholly failed to procure a finding which shows any fraud whatever.

Furthermore, if we look beyond the petition to the unauthorized consideration of the claim on its merits, the facts of the case tend strongly to show that substantial justice has been done between the parties. In such cases, under a well-established rule of appellate procedure, any intervening technical error which does not deprive the complaining party of some substantial right will be disregarded on appeal.

The prevailing opinion assumes to find cause for reversal in the unauthorized hearing on the merits, in connection with the hearing on the motion of appellant, and the statements of the members of the board in announcing their decision. At most, such hearing and statements only amount to irregularities in the proceedings, on a question not then properly before the board.

But, even if we look to the statements, we find that they deal mainly with expressions of opinions as to the law applicable to the case, the main proposition being whether the accident involved arose out of and in the course of the employment of the deceased.

On the facts of the case as presented by the prevailing opinion, about which there seems to be no controversy, in the light of the decisions cited in the concluding paragraph of the opinion, there can, in my opinion, be but one reasonable conclusion, which is that the accident arose out of and in the course of the employment. In the light of these authorities, the award made by agreement of the parties and approval by the board is legal, comes within both the letter and spirit of the compensation law, and satisfies the ends of justice.

No fraud is shown, nor does it seems possible that appellant was misled or deceived in any way, but, on the contrary, the facts show that it had full knowledge of what was being done at all times, and, for some reason within its own keeping, failed and neglected to take timely action to obtain a hearing, and wholly fails to show any reasonable excuse for such delay and inaction.

So appellant, in my opinion, has not only failed to show reversible error, but has likewise wholly failed to make even a prima facie case of great injustice, which may, in exceptional cases of great hardship, justify this court in directing a rehearing in order to give a diligent party an opportunity to right an apparent wrong for which there is no other adequate remedy.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

JEFFERSON HOTEL CO.

v.

YOUNG. (No. 10364.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF AWARD.

Workmen's Compensation Act, §§ 59, 60, as amended by Acts 1917, c. 63, §§ 1, 2, do not require that the board serve notice that an award has

* Decision rendered, Dec. 10, 1918. 121 N. E. Rep. 94.

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been made, and any means ordinarily employed in sending papers, including transmission by mail, express, or messenger, may be used.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEWING AWARD—PREJUDICIAL ACTS OF BOARD

Where the Industrial Board mails a notice to an employer that an award has been made, fact that the letter was never received does not show any omission of duty on the part of the board such as would excuse the employer from complying with Workmen's Compensation Act, § 60, as amended by Acts 1917, c. 63, § 2, requiring parties desiring to review an award to make application within seven days.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AN AWARD.

Workmen's Compensation Act, §§ 59, 60, as amended by Acts 1917, c. 63, §§ 1, 2, require that one desiring a review of an award by the full board make application therefor within seven days, regardless of when he received notice of the award and regardless of diligence exercised.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AWARD—WAIVER OF STATUTE.

An applicant for compensation under the Workmen's Compensation Act cannot waive the provisions of section 60 (as amended by Acts 1917, c. 63, § 2), requiring an application for review of an award to be made within seven days.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AWARD.

Even if Burns' Ann. St. 1914, § 405, is applicable to proceedings before the Industrial Board, it does not authorize the board to extend the time for filing an application for review beyond the period definitely fixed by Workmen's Compensation Act, § 60, as amended by Acts 1917, c. 63, § 2.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AWARD—DILIGENCE.

Assuming that the Industrial Board possessed discretionary power to hear and determine an application for review after the expiration of the 7-day period provided by Workmen's Compensation Act, § 60, as amended by Acts 1917, c. 63, § 2, the fact that the secretary of the board informed employer that a review could not be had would not justify a further delay of 21 days in filing an application.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Harvey Young to obtain compensation for personal injuries, opposed by the Jefferson Hotel Company, the employer, and the Ocean Accident & Guaranty Corporation, Limited, insurance carrier. From an order of the Industrial Board dismissing its application for review of an award, the employer appeals. Affirmed.

Pickens, Moores, Davidson & Pickens, of Indianapolis, for appellant.
Eli F. Seebirt and Daniel D. Schurtz, both of South Bend, for appellee.

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BATMAN, J. On August 20, 1917, appellee filed his application before the Industrial Board for an adjustment of his claim against appellant for compensation under the Workmen's Compensation Act (Laws 1915, c. 106). A hearing thereon was had on September 13, 1917, at South Bend, Ind., before a single member of the board, and at which appellant appeared by attorneys. Thereafter on February 27, 1918, said member of the board rendered an award in favor of appellee. On April 3, 1918, appellant filed its application for a review of said award before the full board, alleging that it was not sustained by the evidence, and was contrary to law, and that neither it, nor its insurer, had received a copy thereof as required by law. On April 27 and June 21, 1918, additional evidence was heard on said application, and thereafter on June 28, 1918, the full board made a finding of facts, and entered an order dismissing said application. The finding of facts is long; but the portions thereof, material to a determination of the questions presented on appeal, are substantially as follows: That on February 27, 1918, the date of said award, the Industrial Board, by its secretary, transmitted by United States mail, to Wilkerson, Cassells & Potter of Chicago, Ill., the attorneys for the Ocean Accident & Guaranty Corporation, Limited, a copy of said award, which was not received by said attorneys; that, at the time of appellee's alleged injury, said corporation was the compensation insurance carrier of appellant; that no copy of said award was transmitted by said board to appellant; that said corporation, as the compensation insurance carrier of appellant, on April 3, 1918, filed in the name of appellant an application for a review before the full board; that in the matter of appellee's claim the said corporation as the compensation insurance carrier, assumed to act for and instead of appellant; that some time prior to March 27, 1918, appellee, by and through his attorneys, notified appellant of the award rendered on February 27, 1918 and demanded payment thereof; that prior to September 13, 1917, on said date and ever since, said corporation has maintained an office in the city of Chicago, Ill., from and through which it handles its compensation claims at South Bend, Ind., the place where said claim was heard before a single member of the board, prior to making the award; that on March 7, 1918, the said corporation received at its office in Chicago, Ill., a letter from appellee's attorneys apprising it of the award made on February 27, 1918; that on said date said corporation, through its employees in said office, by and through said letter, became apprised of the fact that said award had been made on February 27, 1918; that said letter was submitted to, and the contents thereof made known to, the manager of said corporation in charge of said office on March 11, 1918; that on said date said manager wrote to the office of said corporation at the city of Indianapolis, Ind., directing said office to make inquiry at the office of said board, as to whether or not said award had been made; that said letter was received by the office of said corporation in Indianapolis, Ind., on March 12, 1918; that on said date an employee of said corporation in said city made inquiry of the secretary of said board as to whether or not said award had been made, and was informed by him that said award had been made February 27, 1918; that said information was on said date transmitted by letter to the manager of the Chicago office of said corporation, and was by said manager received on March 13, 1918; that on March 29, 1918, said board received a letter from appellee's attorneys, in which they stated that they would waive objection that an application for a review before the full board was not filed within seven days; that the contents of said letter were communicated to said corporation by a letter from said board on March 30, 1918, which was received by said corporation at Chicago, Ill., on April 2, 1918. Based on said finding, the board entered an order dismissing appellant's application for a review of the award. From this order appellant has appealed, and submits the action of the board in dismissing its application for review, as the sole error on which it relies for reversal.

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[1, 2] The Workmen's Compensation Act makes the following provisions pertinent to a determination of the question presented by this appeal:

"Sec. 59. The board, by any or all of its members, shall hear the parties at issue, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of proceedings, and a copy thereof shall immediately be sent to each of the parties in dispute.

"Sec. 60. If an application for review is made to the board within seven days from the date of an award, made by less than all the members, the full board, if the first hearing was not held before the full board, shall review the evidence, or, if deemed advisable, hear the parties at issue, their representatives and witnesses as soon as practicable and shall make an award and file same, with a finding of the facts on which it is based, and the rulings of law by the full board, if any, and send a copy thereof to each of the parties in dispute, in like manner as specified in the foregoing section." Acts of 1917, p. 154.

It will be observed that appellant did not file its application for a review of the award within the seven-day period provided in said section 60. Appellee contends that the right to review an award is statutory, and can only be had by strict compliance with the statute providing for the same, as without such compliance the board has no jurisdiction over the subject-matter. As opposed to this contention, appellant asserts that the board has discretionary power, when a proper showing is made, to ignore the seven-day period provided in said section 60; that the facts of this case called for the exercise of such discretion in its favor, and the failure of the board to do so was error. In support of this contention, it cites the opinion of this court in the matter of In re Ale, 117 N. E. 938. That opinion, however, does not sustain appellant's contention, as it only goes to the extent of holding that the right of a party to have an award reviewed should not be prejudiced by the failure of the board to discharge a statutory duty. In reaching this conclusion, the court followed the general rule that where a party, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right wholly by the neglect or misconduct of an officer charged with a public duty with reference thereto, the law will protect him. It also recognized the principle involved in the maxim of the law that "an act of the court shall prejudice no one," and applied it to the Industrial Board, which, although an administrative body, has at least quasi judicial powers. The effect of the ruling in the opinion cited is, not to break down the provision of the statute limiting the time in which an appeal may be taken, but to exclude from its operation such time as may have been lost solely by the failure of the board to discharge a required duty. In this case, the finding of facts shows that, on the date the award was made, a copy of the same was transmitted by the secretary of the board to Wilkerson, Cassels & Potter of Chicago, Ill., the attorneys for appellant's compensation insurance carrier, who were evidently the same attorneys that appeared for appellant at the hearing before the single member of the board at South Bend, as disclosed by the record. The statute does not require that such copy shall be "served" on the parties, nor does it specify the manner in which it shall be transmitted to them. It merely provides, in said section 59, that "a copy thereof shall immediately be *sent* to each of the parties in dispute." In the absence of any provision in that regard, we may assume that the Legislature intended that the board might discharge such duty by the use of any means ordinarily employed in sending papers, which would include transmission by mail, express, or messenger. In the instant case, the United States mail was used for such purpose; but the copy so sent was not received. This failure, however, is not shown to be chargeable to any omission of duty on the part

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of the board, and hence does not fall within the ruling made in the matter of In re Ale, supra.

[3] But appellant contends that said sections 59 and 60 should be so construed as to require a party who has actually received a copy of the award, transmitted as provided in the former section, to file his application for a review thereof within the seven-day period provided in the latter section; but as to a party who has not received a copy of the award, and has no knowledge that one has been made, it is only necessary that he use diligence to secure a review of the same after he obtains knowledge thereof. We cannot concur in this contention. To do so would require that we hold that the seven-day period in which a party may file an application for a review shall run from the time of receiving notice that an award had been made, rather than from the date of the award as the statute expressly provides. A party to a proceeding before the board is entitled to know with reasonable certainty when a hearing on an application becomes final, and an award thereon becomes effective. This could not be under appellant's contention, as long as the statute only requires the board to send a copy of the award to the parties in dispute. If the construction of the statute for which appellant contends was adopted, a party would always stand in danger of having the status of a claim unsettled, after the lapse of the statutory seven-day period for review, by the opposing party appearing before the board, and asserting that it did not receive a copy of the award which the board was required to send, and did not know that one had been made, and claiming the right to have the award reviewed. It would open the way for fraud and dishonest practice against which diligence would not afford protection. If it had been the intention of the Legislature that the seven-day period for filing an application for review should begin to run against a party from the time of notice that an award had been made, rather than from the date thereof as the statute expressly provides, it is reasonable to presume that some appropriate language would have been used indicating such fact, and that some method would have been provided by which the beginning of said seven-day period could be definitely ascertained. In the absence of such language and such a provision, we are constrained to hold that the Legislature did not so intend. The reasons on which appellant bases his contention would be appropriate and possibly effective in support of a proposed amendment of the statute in that regard, but do not furnish grounds for reaching the same result through judicial construction.

[4] Appellant further contends that the consent of appellee to a review of the award, after the lapse of the seven-day period, gave the board jurisdiction to hear and determine appellant's application therefor. While the Industrial Board retained jurisdiction over the subject-matter of appellee's claim for certain purposes after the award, it had no jurisdiction to review the same without a compliance with said section 60. Appellee could not waive such compliance and confer jurisdiction by consent. Steinmetz v. Hammond Co. (1906) 167 Ind. 153, 78 N. E. 628.

[5] Appellant also contends that section 405, Burns 1914, authorizes the board to grant a review of the award under the facts of this case. That section of the statute relates to civil procedure in courts of this state, and it appears not to be applicable to special proceedings, unless made so by the statute authorizing the same. Hays v. Tippy (1883) 91 Ind. 102; Dukes v. Working (1883) 93 Ind. 501; Shaum v. Harrington (1909) 173 Ind. 610, 91 N. E. 226; Amacher v. Johnson (1910) 174 Ind. 249, 91 N. E. 928. It has been held that the rules of procedure prescribed in the Civil Code are not available in matters before the Industrial Board. Hagenback v. Leppert (1917) 117 N. E. 531; Union, etc., Co. v. Davis, 63 Ind. App. 548, 114 N. E. 872. In any event, the application of said statute could not have the effect of authorizing the board to extend the time for filing an aplication for review beyond the period definitely fixed by the act providing for the same.

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[6] We may add, however, that if appellant was correct in its contention that the Industrial Board possessed discretionary power to hear and determine an application for review after the expiration of the seven-day period provided in said action 60, it would not be entitled to prevail on this appeal, either on the evidence adduced at the hearing, or the facts found by the board. There are no facts that show proper diligence to secure a review of the award after notice thereof, and no evidence which would justify such a finding. Appellant gives some stress to the fact that the evidence shows that the secretary of the board informed the stenographer of the claim agent of appellant's compensation insurance carrier, when she called on him with reference to a review of the award, that it could not be had as the time had expired. But this fact would not justify a further delay of three times the statutory period of seven days provided in said section 60, if it desired to offer and press an excuse for a prior delay in filing its application for review.

The record fails to disclose any available error, and the order of the Industrial Board, dismissing appellant's application for review, is therefore affirmed.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

KINGAN & CO., LIMITED,

v.

OSSAM. (No. 10270.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW BY INDUSTRIAL BOARD.

Under Workmen's Compensation Act of 1915, § 60, as amended in 1917, providing that, if application for review is made to the Industrial Board, within seven days, from award made by less than all the members, the full board, if the first hearing was not held before it, shall review the evidence, the board has no jurisdiction to review an award of the full board, although the hearing was held before less than all the members.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW BY INDUSTRIAL BOARD—STATUTES—AMENDMENT.

That Workmen's Compensation Act of 1915, § 60, providing for review by the Industrial Board if the first hearing was not held before the full board, was amended by Acts 1917, c. 63, so as to preclude review by full board, although hearing may have been before a less number, did not deprive board of jurisdiction to grant rehearing where first hearing was had before amendment.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—FINDINGS OF INDUSTRIAL BOARD.

Where the Industrial Board on a first hearing stated that the applicant's injury resulted in a total disability to work for a certain definite

* Decision rendered, Dec. 17, 1918. 121 N. E. Rep. 289.

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period, and then stated that the disability for which plaintiff claimed compensation "in this proceeding" did not result from his injury, the finding was contradictory, and the latter finding being general must yield to the former specific finding.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION—REVIEW—FINDINGS OF INDUSTRIAL BOARD.

The finding of the Industrial Board in applicant's favor on the question of a change of condition must be given the same effect as the verdict of a jury, or the finding of a court in an ordinary civil action.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—SUFFICIENCY.

In a proceeding to recover for an injury resulting in traumatic hysteria, evidence *held* to sustain a finding of the Industrial Board in applicant's favor that his disability as a result of the injury had recurred, and that he was totally disabled.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"PERSONAL INJURIES."

A "personal injury" includes not merely a break in some part of the body, or some wound, but the consequence or disability resulting therefrom, such as depressed mental or nervous condition.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, First and Second Series, Personal Injury.)

10. MASTER AND SERVANT—WORKMEN'S COMPENSATION—FINDINGS OF FACT.

Where the evidence as to whether an applicant is suffering from a depressed mental condition as a result of injuries is conflicting, the court will not weigh the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

11. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—SUFFICIENCY.

The admission of incompetent evidence by the Industrial Board will not operate to reverse its award, where there is any competent evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

Appeal from Industrial Board.

Proceedings by Charles Ossam under the Workmen's Compensation Law to recover for personal injuries, opposed by Kingan & Co., Limited, employer. From an award affirmed by the full Board, after review on the ground of change of condition, the employer appeals. Affirmed.

Harold Taylor, of Indianapolis, and Jacob S. White, of Rockville, for appellant.

Walker & Hollett, of Indianapolis, for appellee.

BATMAN, P. J. The record in this case discloses:

That on November 14, 1916, appellee filed with the Industrial Board of Indiana his application for an adjustment of his claim against appellant for compensation on account of an injury alleged to have been received

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by him on or about April 25, 1916, while in its employ. That the evidence with reference to said application was heard by less than the full board prior to January 15, 1917, on which date the members who heard the evidence made a general finding against appellee, and the full board made an order that he take nothing by his said application. That thereafter, on January 22, 1917, appellee filed his application to have said award reviewed by the full board. That the full board heard the evidence on said application for review, and on July 16, 1917, made the following finding and award:

"And the full board having concluded the hearing of evidence, and being duly advised in the premises, finds that on the 24th day of April, 1916, plaintiff was in the employment of the defendant at an average weekly wage of $10.50; that on said date, at 10:30 o'clock a. m., plaintiff received a personal injury by an accident arising out of and in the course of his employment, resulting in his total disability to work as a result of said injury from the time of his injury until and including the 16th day of May, 1916; that plaintiff's disability to work as a result of his said injury terminated with the 16th day of May, 1916, and the plaintiff returned to work on the 17th day of May, 1916; that the plaintiff's disability as a result of said injury did not recur, and the disability for which the plaintiff is claiming compensation in this proceeding did not result from his injury of April 24, 1916. It is therefore considered and ordered by the full board that the plaintiff be, and is hereby, awarded, in full of his claim, compensation at the rate of $5.775 per week beginning at 10:30 a. m. May 8, 1916, and terminating with the close of May 16, 1916. It is further ordered that the defendant pay the costs of this proceeding."

That thereafter, on October 17, 1917, appellee filed his application, under section 45 of the Workmen's Compensation Act of 1915 (Acts 1915, p. 392) for a review of said last award on the ground of a change in condition. That the full board heard the evidence on said application, and on February 18, 1918, made a finding that appellee's disability for work, as a result of the injury producing the same, has recurred, and that as a result of said injury appellee has been totally disabled for work continuously since October 4, 1917, and was then so disabled, and awarded him compensation at the rate of $5.775 per week for a period, beginning October 4, 1917, and continuing during the time of his total disability as a result of his injury, not exceeding an aggregate of 500 weeks. From this award appellant has appealed, and has assigned as error that the award of the Industrial Board is contrary to law.

Appellant contends that the orginal award, being an award by the full board from which no appeal was taken, is final and conclusive between the parties, and hence the award on review of the original award and the award on review for change in condition are each void, as the board was without jurisdiction to hear and determine the issues tendered thereby.

[1] We cannot concur in this contention. Section 60 of the Workmen's Compensation Act of 1915 made the following provision for the review of an original award:

"If an application for review is made to the board within seven days from the date of the award, the full board, *if the first hearing was not held before the full board,* shall review the evidence," etc. (Our italics.) Acts 1915, p. 410.

It thus clearly appears from the plain wording of this section that a party to an original award was entitled to a review thereof, where the first hearing was not held before the full board, although all the members thereof joined in making such award. It is contended that this court has heretofore held otherwise in the cases of Kingan & Co., Ltd., v. Buford, 116 N. E. 754, and Kokomo, etc., Co. v. Griswold, 117 N. E. 265. An examination of these cases discloses that in each of them the hearing preceding the original award was held before the full board, and are

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therefore not in conflict with the opinion here expressed, although certain expressions used in discussing the questions then before the court might be so construed. In 1917 the Legislature amended said section 60 so it now reads in part as follows:

"If an application for review is made to the board within seven days from the date of an award, *made by less than all the members,* the full board, *if the first hearing was not held before the full board,* shall review the evidence," etc. (Our italics.) Acts 1917, p. 154.

By this amendment an award by the full board precludes a review thereof, although the hearing may have been held before less than all the members thereof. The act containing this amended section was approved on March 5, 1917, and became effective on that date by virtue of an emergency clause. The record discloses that the first award on appellee's claim for compensation was made by the full board on January 15, 1917, after a hearing before less than all the members thereof. He was therefore entitled to have the same reviewed by the full board under the provision of said section 60 as originally enacted. He availed himself of this privilege by filing his application therefor on January 22, 1917. This application was still pending when said amended section became effective, and the award thereon was made subsequent to said date.

[2] It is well settled that, where a right or remedy which did not exist at common law is founded on a statute, the unqualified repeal of the statute before the right had become vested, or the remedy perfected, abrogates the right and deprives the court of all jurisdiction to proceed further in administering the remedy.

[3] It is likewise true that, when jurisdiction over a subject-matter or special proceeding depends upon an act of the Legislature, if the act be repealed before the proceeding is concluded, the jurisdiction terminates of necessity.

[4] However, where the new legislation does not impair, or take away, the previously existing right, nor deny a remedy for its enforcement, but merely modifies the proceedings while providing a substantially similar remedy, the jurisdiction continues under the forms directed by the latter act, in so far as the two acts are different. Mayne v. The Board, etc. (1889) 123 Ind. 132, 24 N. E. 80; Pittsburgh, etc., R. Co. v. Oglesby (1905) 165 Ind. 542, 76 N. E. 165; Holderman v. Town of North Manchester (1911) 48 Ind. App. 491, 96 N. E. 29; 36 Cyc. 1216.

[5] In the light of the above rule, and the facts of this case, it is obvious that the board was not without jurisdiction to hear and determine appellee's application for a review of the original award. This being ture, there is no basis for appellant's further contention that the board was without jurisdiction to hear and determine appellee's subsequent application for a review of the second award on account of a change in condition.

Appellant contends that the evidence is not sufficient to sustain the finding on which the final award is based. In support of this contention it asserts that the board, by its finding and award, made on review of the original award, determined that the condition in which appellee then claimed he was, was not a condition resulting from his original injury; that appellee did not appeal from said award, and is therefore conclusively bound thereby; that the evidence introduced on the hearing of appellee's application for review by reason of a change in condition is nothing more than additional evidence of the same condition that existed at the time of the review of the original award by the full board, and hence is insufficient to sustain a finding of any facts on which an award could be made in appellee's favor. This contention leads to a consideration of what was actually determined by the board on review of the original award. In considering this question, it should be noted that the finding of the board on such review is contradictory, as it first states that the injury received by appellee on April 24, 1916, resulted in his total dis-

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ability to work for a certain definite period, and then concludes by stating that "the disability for which the plaintiff is claiming compensation in this *proceeding*, did not result from his injury of April 24, 1916." (Our italics.) As appellee had only instituted one proceeding, to have the matter of his compensation determined, of which the hearing on review of the original award was a part, it is evident that the clause quoted contradicts the former finding in that regard.

[6] In view of the fact that the board awarded appellee compensation for a definite period, based on the facts specifically found in the first part of the finding, the latter general finding to the contrary must yield to the former specific finding in that regard, otherwise the award would be groundless, which is not to be presumed. We must therefore disregard such general finding, or treat it as mere surplusage.

[7] It is to be observed, however, that the board of review of the original award failed to find any facts which would authorize any award in favor of appellee by reason of his condition at the time of such review. It follows that, if appellant is correct in its assertion that the evidence on the review, by reason of a change in condition, is nothing more than additional evidence of the same condition that existed at such former review, it would not be sufficient to sustain the final award from which this appeal is taken. In determining the question here involved, it should be noted that the Industrial Board on its final review found that appellee's disability for work, as a result of the injury producing the same, has recurred. This is in effect a finding in appellee's favor on the question of a change in condition. This finding must be given the same effect as the verdict of a jury or the finding of a court in an ordinary civil action. Therefore, if there is any evidence to support such finding, this court is bound thereby. Interstate, etc., Co. v. Szot (1917) 115 N. E. 599. The evidence of the three hearings before the Industrial Board has been brought into the record. We have reviewed it carefully, and note that the evidence on the original hearing, and on the review of the award thereon by the full board, relates mainly to the existence of certain physical conditions of appellee and their probable causes. We also note that on the hearing of the application for review on account of a change in condition there was substantial evidence tending to show that appellee was then suffering from a mental disease, bordering on insanity, known as traumatic hysteria, which did not exist at the time of the hearing before the full board on review of the original award, or, if existing, did not cause disability at such time. Among this evidence we note the following: Dr. W. D. Gatch testified that in his opinion appellee was suffering from what is known as major or very grave hysteria, and was bordering on insanity. Dr. Lyman Overshiner testified that in his opinion appellee was suffering from a mental condition. Dr. J. H. Oliver testified that in his opinion appellee's condition was then more mental than at any other time; that the ailments of which he then complained were entirely mental; that his troubles were first real, then of a malingering nature, and afterwards they became real again; that his present condition was not that of a malingerer; that it was a real mental depression, a real hysterical condition. Dr. C. F. Neu testified that in his opinion there was some evidence that appellee has traumatic hysteria. Dr. J. H. Eberweine testified, in substance, that in his opinion appellee's present condition was a mental state which had developed since the injury. There was also evidence which tended to show that such condition had produced total disability for work, and was the result of the original injury on which appellee based his right of compensation.

[8] Under the rule that this court is limited to a consideration of the evidence most favorable to the appellee, in determining its sufficiency to sustain the finding of the Industrial Board, we are forced to the conclusion that the evidence in this case is sufficient in that regard. Haskell & Barker Car Co. v. Brown (1917) 117 N. E. 555.

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[9] The fact that appellee was suffering from a mental or nervous condition resulting from a physical injury, rather than from the physical injury itself, cannot have the effect of relieving appellant from liability. This court is committed to the doctrine that a "personal injury," as that term is used in the Workmen's Compensation Act, has reference not merely to some break in some part of the body, or some wound thereon or the like, but also to the consequence or disability that results therefrom. In re McCaskey (1917) 117 N. E. 268; Indian Creek, etc., Co. v. Calvert (1918) 119 N. E. 519. It is apparent that certain mental and nervous conditions may be effective in producing disability as a physical wound or the loss of a member. Such conditions, therefore, afford a basis for compensation. In re Hunnewell, 220 Mass. 351, 107 N. E. 934; Honnold on Workmen's Compensation, vol. 1, p. 293; Eaves Blaenclydach, etc., 2 B. W. C. C. 329; Yates v. South Kirby, etc., Collieries, 3 B. W. C. C. 418; Morris v. Turford and Southward, 6. B. W. W. C. 606. It may be conceded as appellant contends that a mental attitude toward an original injury, voluntarily assumed, cannot be said to be a result of such injury; that intentional and willful practices, and the use of mental processes, by which mental and physical infirmities are developed into injurious conditions, will defeat a claim for compensation, as under such circumstances the injured employee becomes the responsible agent for his own condition. However, under the evidence of this case, the most that can be said in appellant's favor in that regard is that the evidence is conflicting.

[10] Under such circumstances we cannot weigh the evidence and determine where the preponderance lies, but must accept the finding of the Industrial Board as conclusive on such fact. Interstate, etc., Co. v. Szot, supra.

Appellant contends that the finding of facts on which the last-named award was made is based entirely on the opinions of physicians; that the said opinions were based upon facts and assumed facts not proven, and hence such fiinding is not sustained by the evidence, and the award based thereon is unauthorized. An examination of the record discloses that the opinions of the witnesses who testified on the final hearing, in so far as they relate to appellee's mental condition, were mainly based on examinations and observations made of appellee, on statements made by him during the progress thereof, and on the history of the case. The facts involved in these several matters were given in evidence by the several witnesses before stating their opinions based thereon. The facts learned by a physician while making an examination or observation of a person are clearly proper matters to be considered in forming an opinion as to his physical or mental condition. Expressions of present pain on such occasions, as a rule, are proper to be considered in determining the subject's physical condition, and any statement made by him is a proper matter to be considered in determining his mental condition. In so far as the facts relating to the history of the case involved any statements made by appellee to the witnesses, it suffices to say that there was evidence on the former hearings, which was before the board for its consideration on the final hearing, which tended to establish substantially all the facts thus involved. If it could be said there was any fact thus involved not so supported, it would not have the effect of rendering the opinion of the witness incompetent, if there was proper evidence of other facts on which it rested, although it might affect its weight. Taylor v. Taylor (1910) 174 Ind. 670, 93 N. E. 9.

[11] In this connection it should be borne in mind that the admission of incompetent evidence by the Industrial Board will not operate to reverse its award, where there is any competent evidence to support it. United Paperboard Co. v. Lewis (1917) 117 N. E. 276; Haskell & Barker Car Co. v. Brown, supra. In this case the board has found in favor of appellee on the issue of a change in condition. There is substantial competent evidence tending to show that this change has resulted in a mental

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affliction, which has caused a disability for work. The finding on such issue must therefore be sustained, even if it could be said that incompetent evidence was admitted on such issue. Appellant's contention regarding the sufficiency of the evidence therefore cannot be sustained.

We find no reversible error in the record. The award is affirmed, with 5 per cent damages, as provided by section 3 of the amendment of 1917 (Acts 1917, p. 155).

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

SCHWARTZ

v.

GERDING & AUMANN BROS. ET AL. (No. 10281.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PERSONS ENTITLED TO AWARD.

Under Workmen's Compensation Act, § 38, the dependency of a 13 year old daughter of deceased, not presumed to be conclusively dependent, is to be determined as question of fact upon consideration of father's legal obligation under a divorce decree ordering payment for her support, his moral obligation, and whether the order would be discharged or enforced.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—FINDING OF INDUSTRIAL BOARD —REVIEW.

Where there is evidence which would lead reasonable men to conclude, as did the Industrial Board on the question of daughter's dependency in fact, under Workmen's Compensation Act, § 38, the Appellate Court is not at liberty to disturb such conclusion.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceeding under the Workmen's Compensation Act for compensation for the death of Frederick Schwartz. From the action of the Industrial Board in holding as matter of law that Jessie Schwartz, widow of deceased, was entitled to the full award, Marietta Mabel Schwartz, by her next friend, Lizzie Iames, appeals. Award affirmed.

O. E. Fuelber, of Ft. Wayne, for appellant.
Enos Cole, of Hartford City, for appellees.

IBACH, J. This is a proceeding brought under the Workmen's Compensation Act, and the only question presented for our consideration relates to the action of the Industrial Board in holding as a matter of law that Jesse Schwartz, widow of Frederic Schwartz, was his sole dependent and entitled to the full award.

[1, 2] As affecting this question the finding of the Industrial Board is as follows: At the time of the death of Frederick Schwartz, Jessie

* Decision rendered, Dec. 12, 1918. 121 N. E. Rep. 89.

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Schwartz was his lawful wife, and they were living together at that time. Decedent also left Marietta Mabel Schwartz, a daughter by his first wife, and from whom he was divorced on June 2, 1906. In the decree of divorce, decedent was ordered to pay for the support of his daughter $8 per month. He never complied with such order and never paid or contributed anything to his daughter's support after the divorce, and no steps were ever taken to enforce the order made in her behalf. She never lived with her father after that time and was not dependent upon him for support to any extent at the time of his injury and death.

In an agreed statement of facts before the board, it was shown, as a part of the decree in the divorce proceeding, that the custody of the child Marietta Mable Schwartz, aged two years, was given to Lizzie James, her aunt. She was at once placed in the custody of her said aunt, and since the entry of such order and decree has been in her care and custody and has lived with her ever since.

The material provisions of the Workmen's Compensation Act (Acts 1915, p. 402) here involved are as follows:

"Sec. 38. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she lives at the time of his death. * * * (c) A boy under the age of 18, or a girl under the age of 18 upon the parent with whom he or she is living at the time of the death of such parent, there being no surviving dependent parent. * * * In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such cases, if there is more than one person wholly dependent, the death benefit shall be divided among them; and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency."

It is clear from this section of the act that the widow is conclusively presumed to be wholly dependent. It is equally clear that the daughter, who is 13 years of age, is not conclusively presumed to be wholly dependent, because it appears that she was not living with her father at the time of his death. So that, if the daughter is entitled to compensation, it must be because she is shown to be wholly dependent on the decedent under that portion of said act which provides:

"In all other cases the question of dependency in whole or in part shall be determined in accordance with the fact, as the fact may be at the time of the injury."

While it may be conceded, as contended by appellant, that there was a legal as well as a moral obligation resting upon decedent to support his daughter, yet the question of dependency, in cases such as this, is not to be determined upon such obligations, although they are to be taken into consideration when the question of dependency is to be determined as a matter of fact. Also, the fact that decedent was ordered, in the divorce proceeding referred to, to pay $8 per month for the support of his child, may be taken into account to determine the existence of the ultimate fact of dependency. Likewise, whether there is any probability that such order would be discharged either voluntarily or by proper legal proceedings, or the probability that the daughter would ever seek to enforce her rights under the order, if the requirements thereof were not voluntarily complied with, are matters which would be proper for the Industrial Board to consider in connection with all other competent evidence to aid them in determining the question of fact whether or not appellant at the time of her father's injury, resulting in his death, depended upon his wages for her support in whole or in part. All these matters the record shows were duly considered by the Industrial Board, which resulted in a finding against appellant, and, as there is evidence which would

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lead reasonable men to conclude as did the Industrial Board, we are not at liberty to disturb such conclusion.

We deem it unnecessary to further pursue the discussion, as this court has heretofore considered and passed upon the controlling question herein involved. See In re Carroll, 116 N. E. 844.

Award affirmed.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

INDIANAPOLIS LIGHT & HEAT CO.

v.

FITZWATER. (No. 10276.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —WILLFUL MISCONDUCT OF EMPLOYEE—EVIDENCE.

Findings of Industrial Board held contrary to contention of employer, appellant, that employee, a lineman, was guilty of willful misconduct within Workmen's Compensation Act, § 8.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—FINDINGS OF INDUSTRIAL BOARD —CONCLUSIVENESS.

Findings of Industrial Board must be upheld by court on appeal unless unwarranted by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WILLFUL MISCONDUCT—BURDEN OF PROOF.

The burden of showing that employee, a lineman, was guilty of willful misconduct within Workmen's Compensation Act, § 8, rested upon employer.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"WILLFUL MISCONDUCT."

That lineman killed by coming in contact with wire charged with electricity was guilty of contributory negligence, or of an infraction of certain rules of the employer, which were enforced with little or no diligence, would not constitute "willful misconduct," within Workmen's Compensation Act, § 8; it being necessary to show an intentional disobedience to a strictly enforced rule

(For other cases, see Master and Servant, Dec. Dig. § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.)

5. MASTER AND SERVANT—FINDINGS OF INDUSTRIAL BOARD —REVIEW.

There being substantial evidence sufficient to support facts found by Industrial Board, the same must stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

* Decision rendered, Dec. 11, 1918. 121 N. E. Rep. 126.

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Appeal from Industrial Board.

Application by Mable Fitzwater for compensation for the death of Quincy Fitzwater, deceased employee, opposed by the Indianapolis Light & Heat Company, employer. Award for petitioner, and employer appeals. Award affirmed, with 5 per cent. damages, as provided by section 3 of the amendment to the Workmen's Compensation Act (Acts 1917, c. 63).

Elmer E. Stevenson, of Indianapolis, for appellant.

Frank A. Bruce, of Indianapolis, for appellee.

IBACH, J. Quincy Fitzwater was killed in an industrial accident on August 30, 1917, while he was in the employ of appellant as a lineman at an average weekly wage of $19.72.

It appears that decedent was engaged in removing some heavy copper wires from appellant's pole and cross-arms and replacing them with lighter wires. On the day he was killed he had gone to the south end of a line of poles on Meridian street, climbed one of the poles, fastened "a rope hand line" to one end of the large copper wire, then cut such wire near where he had fastened the rope. He then droppd the wire and rope to the ground and descended the pole. He was either preparing to place tape around the rope where it was fastened to the wire, or was actually engaged in so doing, so that the severed wire could be guided over the cross-arms, when in some manner such wire became charged with electric current and conveyed into his body, causing his death.

The application for compensation filed by appellee, decedent's widow, before the Industrial Board, was in the usual form. The evidence was finally heard by the full board, and an award made granting to the petitioner compensation for 300 weeks at the rate of $10.86 per week, together with burial expenses not exceeding $100.

It is from this award that appellant appeals, and contends the uncontradicted evidence shows that decedent met his death by reason of his willful misconduct and willful failure to use safety appliances and his willful failure to obey its orders and rules and to take the precautions required of him by law, and therefore, under section 8 of the Workmen's Compensation Act (Acts 1915, p. 392), it was error to award any compensation. In other words, it is insisted that the conduct of the decedent under all the facts and circumstances of the case amounted in law to willful misconduct as defined in section 8, supra, and therefore the award made by the Industrial Board was not sustained by the evidence and is contrary to law.

[1, 2] The findings of the Industrial Board are against the contention, and must be upheld by this court unless such findings are not warranted by the evidence.

In addition to the facts already disclosed, it is found:

That appellant had actual knowledge of decedent's injury and death at the time of the occurrence. That appellant duly executed a report thereof to the Industrial Board, and filed the same in proper time, and that appellee was decedent's wife, and was living with him at the time of his death. At the time of decedent's death, and for a long time prior thereto, appellant had in force certain written rules relative to the manner in which linemen should perform their work, and a copy of said rules had on different occasions been furnished to decedent long prior to the date he was electrocuted. In a general way the rules provided that all tools would be furnished by appellant to the linemen on application to the storekeeper, except pliers, connectors, climbers, screwdrivers, and belts, which tools the linemen were required to own. As to the manner of doing the work and as to the use of safety appliances several rules were adopted. Rule 9 provides:

"Never place the line where it can get against a sign, cornice, roof,

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pole, or anything else where exposed to the weather, unless it would first rest against glass."

"Rule 13. * * * It is your orders at all times to do what you do thoroughly."

"Rule 14. When working on a circuit keep it 'closed.'"

"Rule 15. In working on lines all circuits must at all times be regarded as alive and grounded. With hundreds of miles of wire throughout the city, some of which are carrying heavy currents at all times, many using ground return, the line you are on may 'come alive' at any time—be careful."

"Rule 7. When working on poles always use your safety belts, as well as other safety devices you are requested to use."

"Rule 18. * * * The company demands that you take necessary time and precaution for your own protection at all times."

"Rule 20. The company will furnish rubber gloves and insulating stools which you are commanded to use at all times. Don't neglect this."

"Rule 21. Do not depend upon insulated wire for safety. Insulation of high-tension aerial wires is impossible."

The rubber gloves provided by defendant did not cover the arms of the workmen above the wrist joint. If decedent had had on a pair of the gloves at the time of his injury, they would not have prevented his injury and death. Up to the time of decedent's death the extent to which, and the manner in which, the safety appliances provided by defendant and described in its rules were to be used, were left almost entirely to the discretion of the particular workman. The rubber shield had not up to that time been used extensively, and was not regarded by the foreman under whom decedent was working at the time as an efficient safety device. "That the evidence does not show, and the board cannot find, that the use of the safety devices provided by the defendant and described in its rules would have prevented the injury and death of decedent. That the exact manner in which the live wire came in contact with the arm of decedent is not shown by the evidence. That his injury and death were not due to any willful misconduct upon his part or to any willful disobedience of the rules of the defendant, or to any willful failure to use any safety device provided by it. That defendant's foreman under whom decedent was working had not given him any specific instructions as to the manner in which he should detach the wire on August 30, 1917, and had not given him any specific instructions as to compliance with any of the rules of defendant, or as to the use of any safety device whatever, but had left to the discretion of decedent the determination of the manner of doing said work, and also the determination and advisability of using safety devices and the manner of their use. That the injury resulting in the death of decedent was due to an injury by accident arising out of and in the course of his employment with the defendant."

[3] As we have said, the determination of the controversy in this case depends entirely on whether the injury and death of decedent was caused by his own willful misconduct, and the burden of showing this fact rested upon appellant. It has been repeatedly held that "willful misconduct" means something different from and more than negligence, however great; it involves conduct of a quasi criminal nature, the intentional doing of something, either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences. Haskell Barker Car Co. v. Kay, 119 N. E. 811.

[4] It may be conceded that the evidence shows decedent to have been guilty of contributory negligence in doing the particular work required of him, that is to say, he did not exercise that degree of care which the conditions and circumstances called for; but negligence does not prevent compensation. And it might be said that there was some evidence before the board which would justify the inference that decedent was guilty of an infraction of certain rules of appellant company which

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were enforced with little or no diligence and were left largely to the option and discretion of its employees for their enforcement, but this falls far short of willful misconduct as intended and contemplated by the statute supra. There must be shown an intentional disobedience to a strictly enforced rule to support the defense of willful misconduct.

[5] The evidence, however, taken as a whole, supports the finding of the Industrial Board, and does not warrant the holding on our part that the evidence compels the conclusion as a matter of law that decedent met his death by reason of his own willful misconduct. On the contrary, we are satisfied that there is substantial evidence sufficient in itself to support the facts found by the Industrial Board, and certainly ample evidence which aided by fair inferences fully warrants such findings. This being true, the finding of the Industrial Board must stand.

Award affirmed, with 5 per cent. damages, as provided by section 3 of the amendment to the Workmen's Compensation Act (Acts 1917, p. 155).

SUPREME COURT OF IOWA.

REED

v.

DICKINSON ET AL. (No. 32459.)*

1. COMMERCE—"INTERSTATE COMMERCE"—UNLOADING FREIGHT CAR.

Plaintiff servant, injured while helping to remove from a freight car steel rails being hauled over main lines of defendant railroad running from Chicago to Omaha, and which when distributed were to be substituted for rails being removed, was engaged in "interstate commerce" within the federal Employers' Liability Act, § 1 (U. S. Comp. St. 1916, § 8657).

(For other cases, see Commerce, Dec. Dig. § 27[5].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

2. MASTER AND SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.

In an acton under federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665) by plaintiff, member of construction gang injured while helping to unload rails to be used in replacing defective ones being removed, contention of defendant being that injury was due exclusively to plaintiff's negligence, *held*, that the court erred in directing verdict for defendant.

(For other cases, see Master and Servant, Dec. Dig.. § 289[29].)

3. MASTER AND SERVANT—INJURY TO SERVANT—ACTS IN LINE OF EMPLOYMENT.

In action by plaintiff member of construction gang to recover for injury sustained while unloading rails from defendant's freight car,

* Decision rendered, Dec. 14, 1918. 169 N. W. Rep. 673.

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held, under evidence, that plaintiff at the time of the injury was engaged in the very act which he was directed by defendant's foreman to do.

(For other cases, see Master and Servant, Dec. Dig. § 276[10].)

Appeal from District Court, Pottawattamie County; O. D. Wheeler, Judge.

Action brought under the federal Employers' Liability Act to recover damages for personal injury. Opinion states the facts. Judgment was rendered for the defendant in the court below on a directed verdict. Plaintiff appeals. Reversed.

Thomas Q. Harrison and H. L. Robertson, both of Council Bluffs, for appellant.

F. W. Sargent and J. G. Gamble, both of Des Moines, and Saunders & Stuart, of Council Bluffs, for appellees.

GAYNOR, J. This action is under the federal Employers' Liability Act, and is brought to recover damages claimed to have been sustained through the negligence of the defendant while engaged in interstate commerce. The action is against the Chicago, Rock Island & Pacific Railway Company and its receivers.

The company answers and denies generally and specifically every statement, allegation, matter, and thing alleged, which, if true, might involve the defendant in liability, and alleges especially that it was not engaged in the operation of, nor did it have possession of, the railway property mentioned in the petition, at the time referred to; that the railway was solely and exclusively in the possession of and operated by the receivers mentioned, under appointment by the federal court.

The receivers, answering, deny both generally and specifically every allegation of plaintiff's petition, and further answer by saying that the plaintiff assumed the risk incident to the work in which he was engaged at the time and on account whereof he claims to have received the injuries, and further say that the plaintiff was guilty of contributory negligence directly contributing to and causing the injuries of which he complains.

That the plaintiff received injury while in the employ of the defendants is not a controverted question here, nor is the extent of his injuries, for the reason that at the conclusion of plaintiff's testimony the court directed a verdict in favor of both defendants, and upon such verdict entered judgment dismissing plaintiff's petition.

The case therefore, as presented here, involves but two questions:

First. Was the plaintiff, at the time he received his injuries, engaged in interstate commerce so as to be within the rule of the federal Employers' Liability Act?

Second. Was the injury exclusively due to the act of the plaintiff himself—that is, due to his own exclusive negligence—or was it due to some negligent act of the defendants, or either of them, which contributed to the injury, for which they, or some of them, ought to be called to respond in damages under the federal Employers' Liability Act?

[1] On the first question, it appears that the plaintiff was working on the main line of the Chicago, Rock Island & Pacific Railway Company, just east of Council Bluffs, that this line runs from Chicago, Ill., to Omaha, Neb.; and that passenger and freight trains pass over the track between these points. Just prior to the time of the injury, steel rails were being hauled over the main line, on flat cars, for distribution along the line, when distributed, to be placed in the track in substitution for old rails that were being removed. At the time plaintiff was injured, he was helping remove these steel rails from the flat car. The rails so unloaded were being used in the repair of the track upon the main line of the company's road.

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Under all the decisions, both plaintiff and defendant were engaged in interstate commerce. The federal Employers' Liability Act as bearing upon this case provides (federal Employers' Liability Act of April 22, 1908, c. 149, § 1, 35 U. S. Statutes at Large 65, U. S. Comp. St. 1916, § 8657):

"That every common carrier by railroad while engaged in commerce between any of the several states or territories, * * * shall be liable * * * to any person suffering injury while he is employed by such carrier in such commerce," if the injury results in whole or in part from the negligence of the carrier or of any of its officers, agents or employees.

This first point was directly decided by this court in plaintiff's favor in Eley v. C. G. W. Ry. Co., 166 N.. W. 739; Ross v. Sheldon, 176 Iowa, 618, 154 N. W. 499; and in Brier v. C., R. I. & Pac. Ry. Co., 168 N. W. 339.

In Deal v. Coal & Coke Ry. Co. (D. C.) 215 Fed. 285, the plaintiff was engaged in repairing telegraph lines owned by the railway company and used in directing the movement of its trains. It was held that the injured party was engaged in interstate commerce, and his rights were governed by the federal Employers' Liability Act.

It has been said that the true test as to whether the employee is within the federal Employers' Liability Act is: Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it? Shanks v. Delaware & L. W. Ry. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

The record shows that defendants were carrying these steel rails on flat cars, for distribution along its right of way, and, when distributed, used in repairing its tracks. The plaintiff, under defendants' foreman, was engaged in removing the rails from the cars. The work, therefore, was so closely related to interstate transportation as to be practically a part of it. See Pedersen v. Ry. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. In this case the injured party was an iron worker employed by the defendant in the alteration and repair of bridges, under the direction of a foreman. A bridge was being repaired. The plaintiff was carrying some bolts or rivets from a tool car to be used that night, or very early the next morning, in repairing the bridge. He was on his way to the bridge carrying with him these bolts, etc., to be used in making the repairs. He was run down and injured while so doing. It was held that his employment was within the purview of the federal Employers' Liability Act, and he was permitted to recover. So we say the plaintiff showed a right of action under the federal Employers' Liablity Act, and the court erred in dismissing his petition on that ground.

[2] II. It is next contended that the injury which he sustained was exclusively due to his own negligence, to his own want of care, and not due to, or contributed to, by any negligence of the defendant, and that therefore, even conceding that his action is properly brought under the federal Employers' Liability Act, he has not shown a right to recover.

Upon this question the record is not as clear as might be, but we gather from the record this state of facts: He was injured on the 27th day of August, 1915. On this day he was employed as a common laborer, to work with a construction gang in the repair and maintenance of the defendants' tracks and roadbed. While so employed, it was his duty, under the direction of a foreman, to remove from the flat cars, with the assistance of other employees, certain steel rails which were then to be used in replacing the old and defective rails. These steel rails were heavy. They were piled upon flat cars. It was the duty of the defendant, with the assistance of another, to loosen them so that they could be more easily removed from the car. To remove a rail required at least two of defendants' employees. Plaintiff was selected as one. He and his co-employees were furnished with pinch bars, and instructed to place the bars under the ends of the rails, or in bolt holes in the rails, and to turn

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them, or loosen them from the pile so that they could be removed from the car. Plaintiff, in the discharge of this duty, placed his pinch bar in a bolt hole in one of the rails for the purpose of loosening it from the pile, and at the time of the accident had accomplished this purpose. Another of defendants' employees was at the other end of the same rail, and was charged with and engaged in like work. At the time of the injury, plaintiff had succeeded in moving his end of the rail from its fastening. The employee at the other end of the rail had not succeeded in loosening his end. After plaintiff had loosened his end, he was standing with his bar in a bolt hole in the rail and was pressing somewhat upon his bar. The foreman had instructed both plaintiff and his assistant that whenever they got the rail ready to loosen up, or, as they say, "ready to go," to warn each other of the act by saying. "Lookout!" While plaintiff was so standing with his bar in the bolt hole pressing upon the bar—the extent of which pressures does not appear—his assistant, without warning and without giving the signal that he was instructed to give, suddenly jerked his rail loose, causing plaintiff's bar to strike him in the head, knocking him from the car and injuring him.

The plaintiff testifies:

"I had my lining bar in the bolt hole trying to help the man at the other end to get his end loose. I had my end free. It was loose. I supposed he would let me know when he got his bar down in where he could get hold, and I was there waiting for him to get it and was still holding to help get his bar fastened, when he got his bar in he said nothing. He gave his bar a big heavy wrench, and knocked me head first off the car. I was doing my work, at the time I was hurt, in the usual and ordinary way of doing that work."

[3] It is apparent that plaintiff was injured while in the line of his employment, and while engaged in the very act which he was directed by defendants' foreman to do. Taking this record as it is before us, the jury might well find that the plaintiff had done the work assigned him in the usual and ordinary way. He had succeeded in loosening his end of the rail, and, while standing with his bar in the bolt hole waiting the action of his coemployee at the other end of the rail, the rail was suddenly turned with plaintiff's bar in the bolt hole, and the position of the bar changed by the act of turning. This threw it out of the position, and injury resulted to the plaintiff. Plaintiff was waiting for the employee at the other end to signal him that he had secured a bar hold on the rail sufficiently strong to enable him to turn the rail free from its position and loosen it from the pile. The record shows that his coemployee, without giving the warning which the plaintiff had reason to expect, and which the employee was directed to give, and upon which plaintiff relied, suddenly jerked the rail loose, causing plaintiff's bar to strike him upon the head.

The jury could well have found that the cause of the injury was the sudden and unexpected movement of plaintiff's assistant in suddenly jerking the rail loose without warning plaintiff that he was about to do so, and without warning plaintiff that the rail was in a position to be jerked at that end. It was said in Caverhill v. Boston & M. Ry. Co., reported in 77 N. H. 330, 91 Atl. 917, that, whatever risks the deceased assumed as to the defendants' method of doing business, he did not assume the risk of injury from the negligence of another servant. For an injury so caused the statute expressly makes the employer liable.

It was said by this court in Byram v. Illinois Central Ry. Co., 172 Iowa, 631:

"It is clear that the plaintiff did not assume the risk arising out of the negligence of another employee; for this he could not anticipate or guard against."

The defendants pleaded contributory negligence. This cannot avail them at this time, for it is not a defense under the federal Employers'

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Liability Act. In any event, it can only serve to diminish the damages, if any, allowed to the plaintiff.

On both grounds, we think the court erred in directing a verdict for the defendants, and for that reason the case is reversed.

Reversed.

Preston, C. J., and Weaver and Stevens, JJ., concur.

SUPREME COURT OF IOWA.

STRICKLEN

v.

PEARSON CONST. CO. (No. 32415.)*

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXEMPLARY DAMAGES.

A servant, having accepted compensation under the Workmen's Compensation Act, can have no standing in court to assert the employer's further liability to him for exemplary damages on the ground of gross and reckless negligence.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FIXING STANDARDS OF SAFETY.

Workmen's Compensation Act, § 2477m19, does not require the employer to take the affirmative in the matter of fixing standards of safety, nor does failure to do so work a forfeiture of the protection of the act.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Appeal from District Court, Polk County; C. A. Dudley, Judge.

Action at law to recover damages for personal injury. The material facts are stated in the opinion. There was a judgment for the defendant for costs, and plaintiff appeals. Affirmed.

Chester J. Eller, of Des Moines, for appellant.

Sullivan & Sullivan and Miller & Wallingford, all of Des Moines, for appellee.

WEAVER, J. The defendant company was engaged in the construction of a building in the city of Des Moines, and in the course of such work excavated a hole or pit in which to lay the foundation of a pier. The plaintiff, being then in the employ of the defendant, was by its foreman sent into the pit to perform certain labor there, and while so engaged the earth caved in upon him, causing him serious injury. Both parties had expressed their consent to the terms of the Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), and in compliance with the terms of said statute plaintiff was awarded damages or compensation for his injury, since which time the defendant has paid and plaintiff has received the installments of such compensation as they have become due. Plaintiff now brings this action at law to recover from the company exemplary

* Decision rendered, Dec. 14, 1918. 169 N. W. Rep. 628.

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damages in addition to the compensation which has already been awarded him. In support of this claim he alleges that his injuries were received by the gross and reckless negligence of the defendant and its foreman, and that, while plaintiff has received and accepted the compensation awarded him under the Workmen's Compensation Act, it was not received or accepted in full, or in release, or in satisfaction of his claim for exemplary damages, for which he now demands a recovery. To this petition a demurrer was filed and sustained, and plaintiff thereupon filed an amended and substituted petition, alleging that Alexander Pearson is the "sole owner and proprietor" of the Pearson Construction Company, and his name is therefore substituted as defendant, and he is charged with negligence resulting in plaintiff's injury in the manner already described. It is further alleged that it was the duty of defendant, acting with the Industrial Commissioner, to fix the standard of safety for safety appliances and places of work; that this duty was not performed, and for this reason defendant cannot rely upon the protection of the statute as a defense to plaintiff's claim. The defendant moved to strike the amended and substituted petition as being a mere repetition of the matters in the original petition to which demurrer had been sustained. The motion was sustained, and plaintiff refusing to further plead, and electing to stand on his petition as amended and substituted, judgment was entered for the defendant for costs.

[1-4] I. The pleadings are not in all respects quite clear, but as we understand the record the first and principal claim advanced by plaintiff is that, although both the parties had accepted the terms of the Compensation Act, and damages had been awarded and paid pursuant to such act, the plaintiff may still sue his employer at law, and recover exemplary damages, if his injury was received under circumstances which would have justified the assessment of exemplary damages, had the Compensation Act not been adopted.

The proposition is unsound, and no authority holding otherwise has been called to our attention. Generally speaking, exemplary damages are never a matter of right. If a party suffers an actionable injury, the extent of his right to demand a recovery of damages is the sum or amount which the jury (or court, if it be tried without jury) finds from the evidence will fairly compensate him. If the jury or court in any given case goes beyond that measure of recovery, and increases the amount found in his favor by an allowance of exemplary damages, it is not because they are needed to make him whole, but because the wrongful act of which he complains has been done in malice, or in such high-handed or reckless disregard of duty, that the award is thus increased by way of punishment or example. It is true the plaintiff gets the benefit of exemplary damages when recovered and collected, but they come to him by the grace of the law, and not as a matter of right. If a planitiff is awarded fair compensation for his injuries, no court will grant him a new trial because the jury has failed to award him exemplary or punitive damages. That allowance rests wholly in the discretion of the jury. Constantine v. Rowland, 147 Iowa, 148, 124 N. W. 189; White v. Text-Book Co., 164 Iowa, 693, 146 N. W. 829. And the jury may properly allow exemplary damages only when the plaintiff is also found entitled to recover actual or compensatory damages. White v. Text-Book Co., supra; Myers v. Wright, 44 Iowa, 38; Connelly v. White, 122 Iowa, 391, 98 N. W. 144; Boardman v. Grocery Co., 105 Iowa, 445, 75 N. W. 343. It follows, of necessity, that if a petition states facts which clearly negative any right on plaintiff's part to recover compensatory damages, it fails to state a cause of action for exemplary damages. In this case plaintiff concedes that he has been allowed and has accepted compensation for his injury under the Workmen's Compensation Act, and by the express terms of that act his employer is thereby "relieved from other liability for the recovery of damages or other compensation

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for such personal injury." Code Supp. § 2477m. In short, plaintiff, having accepted compensation from his employer for the injuries of which he complains, can have no standing in court to assert the employer's further liability to him on that account.

[5] II. But plaintiff says somewhat inconsistently that defendant is not entitled to the benefit of the Workmen's Compensation Act, because the demurrer and motion, in legal effect, admit the allegation of the petition that he has not complied with the provisions of section 2477m19 of that act. That section reads as follows:

"The Iowa Industrial Commission co-operating with the employers affected by this act, or any committee or committees appointed by such employers or the Iowa Industrial Commission, shall fix standards of safety for safety appliances or places of employment, except mines," etc.

The simple reading of the section makes it perfectly evident that this section places no affirmative duty upon the employer, save perhaps as there may be an implication of duty in the employer to observe any "standard" of safety so "fixed" by the Industrial Commissioner. The employer is not required to take the initiative in this matter, nor is there any provision making his failure to do so work a forfeiture of the protection of the statute. The allegation in the substituted petition with respect to defendant's alleged failure to take action under said section of the statute is therefore wholly immaterial. The substitution of Pearson as defendant, instead of the construction company, amounts to no more than a correction in the name or designation of the person of this employer. Neither the petition nor the substituted petition states a cause of action against the company or against Pearson.

III. It should be said that the defendant's foreman, Drumhiller, was made a defendant. As to him the trial court overruled the demurrer to the petition, and the argument in this court has been directed entirely to the question whether the plaintiff's pleadings, even if taken as true, discloses any cause of action against the employer, and this is the only question on which we assume to pass.

There is no error in the record, and the rulings and judgment below are affirmed.

Preston, C. J., and Gaynor and Stevens, JJ., concur.

SUPREME COURT OF KANSAS.

RAFFAGHELLE

v.

RUSSELL. (No. 21771.)*

1. MASTER AND SERVANT—INJURY TO SERVANT—RIGHT TO COMPENSATION.

A workman who is injured in the course of his employment is not to be denied compensation for such injury and consequent diminished earning capacity merely because his injury was not so serious as to

* Decision rendered, Dec. 7, 1918. 176 Pac. Rep. 640. Syllabus by the Court.

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totally disable him from labor for the first two weeks immediately succeeding the accident.

(For other cases, see Master and Servant, Dec. Dig. § 385[15].)

2. MASTER AND SERVANT—INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT.

An injured workman who only in pain and distress and with the friendly help of his fellow workmen can earn as much as he did before his injury may maintain an action against his employer for permanent partial incapacity under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942).

(For other cases, see Master and Servant, Dec. Dig. § 385[8].)

3. MASTER AND SERVANT—INJURIES TO SERVANT—LUMP SUM JUDGMENT.

Error assigned on abuse of discretion in an award of a lump sum judgment instead of periodical and terminable payments to an injured workman examined, and not sustained.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Appeal from District Court, Cherokee County.

Action by Paul Raffaghelle against Peter Russell. Judgment for plaintiff, and defendant appeals. Affirmed.

A. B. Keller, George R. Malcolm, and C. O. Pingry, all of Pittsburg, for appellant.

A. L. Majors, of Columbus, for appellee.

DAWSON, J. The plaintiff was employed in defendant's coal mine. A large rock fell from the roof of the mine and crushed a fellow workman. In response to the latter's appeal for help, plaintiff sustained a femoral rupture while exerting all his strength to lift the rock from the injured man.

This case was brought under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942); and the trial court awarded plaintiff a lump sum judgment computed on the basis of $5 and some cents per week for eight years, pursuant to a finding that plaintiff's injuries were of a permanent nature and partially incapacitated him for work.

[1] Defendant contends that there was no evidence to sustain the finding of diminished capacity, and cites part of section 5896 of the General Statutes of 1915, which before the amendment of 1917 (Laws 1917, c. 226) provided:

"That (a) the employer shall not be liable under this act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he is employed."

It is true that plaintiff's injury did not immediately and totally incapacitate him from labor. He continued to work for some time, although he began to feel pain the night following the injury.

Plaintiff testified:

"Before I got hurt I used to lay off and have a good time, and after I got hurt I layed off because I hurt. * * * I lay off about two weeks before I came here. * * * Since I was hurt in the mines I worked every day I possibly could and as hard as I could. I have tried my best. * * * In the Illinois mine I did not work alone. There were two men working with me. * * * When a big chunk would fall my buddy lifted it for me. * * * They lifted the large pieces of coal in the car for me because I couldn't lift them myself. * * * When I am working a knot sticks out on me."

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The statute quoted does not mean that, unless a workman's injuries totally disable him from laboring for the first two weeks succeeding his mishap, he cannot recover. It means that, unless the injury is sufficiently serious to disable him for two weeks, the injury is considered by the statute to be too trivial for its concern. The statute would discourage malingering and the harassing of employers with petty claims of little or no merit. But it would never do to say that the courageous workman who sticks to his task notwithstanding his pain and injury is to be penalized for so doing. Neither would it do to say that an injured workman who in pain and distress and with the gratuitous help of his fellow workmen can still earn as much as he was wont to do before his strength and vigor were impaired is not entitled to compensation. A workman who is injured is not compelled then and there to lay off for two weeks to protect his rights under the act. The soldier who is wounded, but who still "carries on," is looked upon as a hero; the injured workman who likewise attempts to "carry on" will lose nothing by so doing when his rights become a matter of judicial determination.

[2] The court discerns no trouble as to the sufficiency of the evidence of diminished earning capacity. The plaintiff was so much distressed that he had to go to another state, to a mine where the coal vein was eight feet thick and where his "buddies" (friendly fellow workmen) would help him with heavy lifting. The court attaches no controlling significance to the fact that his semimonthly pay checks were sometimes as large or larger after his injury than they were before he was hurt. The evidence shows that in the days of his full vigor he occasionally took a lay-off to enjoy himself; since his injury he occasionally is compelled to take a lay-off because of pain which now attends his arduous vocation. These were merely circumstances to be considered with all the other facts and circumstances, pro and con, in determining whether plaintiff's claim was genuine or spurious.

[3] It is also contended that the court erred—that it abused its discretion—in awarding plaintiff a lump sum judgment, and that, if plaintiff was entitled to compensation, it should have been awarded in periodical payments. It may be true that ordinarily a rupture like a femoral hernia can be successfully treated by a surgical operation which is not considered dangerous to life nor attended by much suffering, and that, if plaintiff would resort thereto, he might be completely restored to his former vigor in a few weeks or months, probably in much less time than eight years. But this court cannot say that on that account the trial court abused its discretion in granting a lump sum judgment. Moreover, in this case, as in many preceding appeals touching this compensation act, counsel urge too strongly the general philosophy upon which compensation acts are supposed to be founded, and do not read with close and critical scrutiny the literal text of the Kansas act. Some years ago, when reformers and magazine writers were urging Legislatures to enact these compensation laws, the matter of periodical payments for injured workmen was elaborated, and it was wisely urged that courts or commissions should have power not only to award such judgments, but also to terminate the periodical payments when assured that the injured workman was completely restored. While that doctrine will be found in the Kansas act (section 5926, Gen. Stat. 1915), the Kansas Legislature apparently had a mind of its own, and it provided first and foremost that where injured workmen are compelled to resort to judicial proceedings to secure compensation, they may be awarded a lump sum judgment, and, secondly, that in the discretion of the trial court the decree may provide for periodical and terminable payments.

"The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under the act, * * * or, in the discretion of the trial judge, for periodical payments as in an award." Section 5930, Gen. Stat. 1915.

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See Cain v. Zinc Co., 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251; Roberts v. Packing Co., 95 Kan. 723, 149 Pac. 413; McCracken v. Bridge Co., 96 Kan. 353, 150 Pac. 832, Ann. Cas. 1918B, 689; Id., 96 Kan. 799, 153 Pac. 525, Ann. Cas. 1918B, 689; Halverhout v. Milling Co., 97 Kan. 484, 155 Pac. 916.

Since the statute gave the injured workman a right to a lump sum judgment, and merely added a grant of discretionary power to the court to modify that right, a failure to exercise a discretionary power which the trial court might or might not care to use does not ordinarily amount to abuse of discretion. Cases have come before this court, and perhaps this is one itself, where, if we were trial judges, we would probably have awarded periodical and terminable payments, although we realize that such a disposition of the matter would give trial judges additional labor, since it is easier to decree lump sum judgments and get the judicial business completely and finally dispatched while the facts are all fresh in memory; but even so, no abuse of discretion in failure to exercise a mere discretionary power being manifest here, we cannot substitute our judgment for the judgment of the trial court on the very matter which the statute has left to the trial court's determination. Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244 (syl. 5); Perkins v. Accident Association, 96 Kan. 553, 555, 152 Pac. 786.

The judgment is affirmed.

All the Justices concurring.

COURT OF APPEALS OF KENTUCKY.

REED'S ADM'X

v.

ILLINOIS CENT. R. CO.*

3. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—VENUE—SUIT IN STATE COURT.

Under the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665), making the jurisdiction of state and federal courts concurrent in actions thereunder and fixing venue in district of defendant's residence or in which cause of action arose or in which defendant shall be doing business, where the cause of action arose in Kentucky and defendant corporation was doing business in Minnesota, the Minnesota courts had jurisdiction if the action might have been brought in the federal court in Minnesota.

(For other cases, see Master and Servant, Dec. Dig. § 253.)

4. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—VENUE OF SUIT IN STATE COURT.

An action in tort against the master for injury to servant may be brought at any place where defendant may be found and served, but the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665) limits actions thereunder to district of defendant's residence or in which defendant is doing business or in which cause of action arose.

(For other cases, see Master and Servant, Dec. Dig. § 253.)

* Decision rendered, Dec. 10, 1918. 206 S. W. Rep. 794.

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10. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

The federal Employers' Liability Act (U. S. Comp. St. 1916 §§ 8657-8665) insures uniformity of substantive law in every action thereunder in any court or state.

(For other cases, see Master and Servant, Dec. Dig. § 250¼.)

11. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY LAW.

There can be no recovery against the master under the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665) without plaintiff showing negligence of carrier's officers, agents, or employees.

(For other cases, see Master and Servant, Dec. Dig. § 87.)

Appeal from Circuit Court, McCracken County.

Equitable action by the Illinois Central Railroad Company against Linnie Reed, as administratrix of the estate of Jerry Reed, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Samuel A. Anderson, of St. Paul, Minn., and Jos. R. Grogan and Mike Oliver, both of Paducah, for appellant.

Wheeler & Hughes, of Paducah, for appellee.

CARROLL, J. This equitable action was brought in the McCracken circuit court by the Illinois Central Railroad Company against the administratrix of Jerry Reed to enjoin her from prosecuting in a district court in the state of Minnesota an action there brought against the railroad company to recover damages for the death of her husband, Jerry Reed, which was caused, as alleged by her in the petition filed in the Minnesota court, by the negligence of the railroad company.

When the case came on for hearing in the lower court, it was adjudged:

"That the defendant, Linnie Reed, as administratrix of the estate of Jerry Reed, deceased, be and she is perpetually restrained and enjoined from maintaining, carrying on, or prosecuting any suit or procedure by her, now instituted in the state of Minnesota, against the Illinois Central Railroad Company, because of, or on account of, the death of Jerry Reed, deceased, and she is perpetually restrained and enjoined from prosecuting or assisting in the prosecution, or in any manner trying the cause of Linnie Reed, as Administratrix of the Estate of Jerry Reed, Deceased, Plaintiff, v. Illinois Central Railroad Company, now pending in the district court of the Second judicial district, in the county of Ramsey, in the state of Minnesota, and the said Linnie Reed, administratrix, as aforesaid, is restrained and enjoined perpetually from in any manner assisting, or engaging in the prosecution of said suit, so instituted in the state of Minnesota, by her as administratrix of Jerry Reed, deceased, against the Illinois Central Railroad Company."

From that judgment this appeal is prosecuted.

Briefly stated, the facts out of which the litigation arose are these: Jerry Reed, at the time he received the injury that resulted in his death, was in the employ of the railroad company as a laborer in its yards in Paducah, Ky., and it was his duty in the course of his employment to carry ice from an icehouse near by to passenger cars that were standing on the tracks in the yards. While performing this labor, Reed, in attempting to pass through an opening on one of the tracks that had been made by uncoupling and separating for a distance of a few feet two of the passenger cars, was caught between the cars when an engine attached to one of them backed it against the other for the purpose of making

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a coupling and was crushed to death; the administratrix claiming that his death was caused by the negligence of the trainmen, while the railroad company's contention is that his death was brought about solely by his own negligence.

In its petition for an injunction it was averred that the death of Reed was not caused by any fault on its part; that the trainmen in charge of the engine did not know of the presence of Reed between the cars at the time or before the coupling was made, or have reason to anticipate that he would go between them, as his conduct in so doing was in violation of the rules of the company; that neither the trainmen nor any other employee of the railroad company was guilty of any negligence in the movement of the cars, or in any other respect that contributed to or brought about the death of Reed.

It was further charged that Reed, at the time of his death, was a citizen of the state of Kentucky, residing in the county of McCracken, and that his widow, who qualified as administratrix, was, at the time of her appointment and qualification, and when the injunction suit was brought, a citizen of the state of Kentucky, residing in McCracken county, in which county she qualified as administratrix; that soon thereafter and while residing in McCracken county she was persuaded to and did employ one Samuel A. Anderson, an attorney residing in the city of St. Paul, Minn., who made a specialty of damage suits against corporations, to bring a damage suit for her against the railroad company; that Anderson, in the prosecution of his practice as a damage suit lawyer, had agents or "runners" who were not lawyers soliciting business for him in the city of Paducah, as well as at various other points in several states of the Union at which railroad companies, whose lines of railroad entered the state of Minnesota, had lines of road and transacted business; that through the instrumentality of his agent or "runner" located in Paducah, who was not an attorney at law, Anderson procured the administratrix to employ him as attorney to institute and prosecute the damage suit in the courts of Minnesota against the railroad company, and as a part of the contract of employment it was agreed that Anderson would investigate at his own expense the facts in relation to the case and pay all cost incident to the institution of the suit, make all bonds that might be necessary in its prosecution, and pay at his own expense the railroad fare, hotel bills, and other necessary expenses of any witnesses that it might be necessary to take from Paducah to St. Paul, and, in addition, support and maintain the administratrix during the pendency of the suit; that, in consideration of his services, Anderson should receive 33 1/3 per cent of the amount recovered by judgment or compromise; that, pursuant to this contract, Anderson had paid to the administratrix $40 a month, as well as contributed in other ways to her wants.

It was further averred that the practice and procedure in negligence cases in the state of Minnesota was materially different from and much more favorable to the plaintiff in suits against corporations than the practice and procedure in the courts of this state, and that the suit was brought in Minnesota for the purpose of avoiding the effect of the practice and procedure in the courts of Kentucky, and to obtain the advantages that would result from the difference between the practice and procedure in Minnesota and Kentucky controlling and regulating this character of suits.

It is provided in part, in section 841 of the Kentucky Statutes, that—

"No company, association or corporation created by, or organized under, the laws or authority of any state or country other than this state, shall possess, control, maintain, or operate any railway, or part thereof, in this state until, by incorporation under the laws of this state, the same shall have become a corporation, citizen and resident of this state."

And further provided that any company, association, or corporation operating a railroad in this state may become "a corporation, citizen and resident of this state" by being incorporated in this state in the manner

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provided in the statute. And it was averred in the petition that the railroad company had observed the requirements of this statute and thereby become a citizen and resident of this state.

It was further averred that the court in which the suit was brought in the state of Minnesota was about 1,000 miles distant from Paducah in this state, the place of the accident, and that it would entail great and unreasonable expense on the part of the railroad company in transporting and defraying the expenses of its witnesses from Paducah, where they all lived, to the place of trial in Minnesota, and in addition thereto would cause it to suffer great loss and inconvenience on account of the necessity of taking and keeping away from their business for several days, and perhaps weeks, witnesses who were connected with the train service and whose presence it would need on the trial of the case; that all of the witnesses that would be needed on the trial of the case by both the plaintiff and defendant were residents of the city of Paducah and engaged in business there at the time the accident happened and when the injunction suit was brought.

It was further averred that there was a circuit court having jurisdiction of actions like this in practically continuous session in the city of Paducah, in which the action could have been brought by the administratrix and prosecuted within a reasonable time to a final conclusion, and that the suit was brought in the state of Minnesota, not only for the purpose of subjecting the railroad company to great and unnecessary expense, but to vexatiously harass and annoy it in the conduct of its business.

To this petition, the averments of which were supported by evidence, an answer was filed by the administratrix traversing all of the material allegations, and in behalf of the administratrix the depositions of several witnesses were taken; but their evidence was confined to an attempt to show that the business of the railroad company would not be seriously disarranged or interfered with if it was required to take some of its trainmen as witnesses to appear in the trial in the Minnesota court.

On this appeal several grounds are relied on for reversal, but we think they may be condensed into these two: (1) That as the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), under which the suit was brought, authorized its institution and prosecution in the state of Minnesota, this right could not be taken away from the plaintiff by injunction in the manner stated. (2) That the court erred in granting a perpetual injunction because the petition did not state, and the evidence did not establish, facts sufficient to warrant an injunction.

[1, 2] Before, however, coming to consider these grounds, it may be stated that the principle that the courts of one state have the power to enjoin a citizen of that state from prosecuting in the courts of another state a suit against one of its citizens is probably as well settled by the great weight of authority as any question involving the power and jurisdiction of courts could be, although there is much difference of opinion as to the grounds on which this power and jurisdiction should be rested; The prevailing opinion being that each case in which this question is presented must be determined by the facts of the particular case.

Thus it is said in 14 R. C. L. 412:

"The general rule, therefore, is, that where a party is within the jurisdiction of the court, he may, on a proper showing, be enjoined from prosecuting an action in a court of another state. The question, however, as to when this jurisdiction may be exercised is often one of great delicacy, owing to the fact that it may frequently lead to a conflict of jurisdiction. Hence, the power is used sparingly, and the petitioner must show good equitable grounds, or the injunction will not issue. * * *

"No general rule can be laid down as to when the court ought to enjoin a party from prosecuting a suit in a foreign jurisdiction. Each case must be ruled by its own facts. If they show that it is necessary and

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equitable to exercise the power in the orderly administration of justice, the court should enjoin the party, otherwise not. Ordinarily if the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting or carrying on proceedings in a court of its own state, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court. All that is necessary to sustain jurisdiction in such cases is, that the plaintiff should show a clear equity, and that the defendant should be subject to the authority and within the reach of the process of the court. The subject-matter in controversy does not apparently have any effect on the court's action in granting or refusing an injunction, but such action is rather dependent on the purpose of the prosecution of the foreign suit or the end to be attained by the injunction."

In Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, Judge Freeman in an extensive note to this case that may be found in 59 Am. St. Rep. 859, said:

"It may, therefore, with confidence, be affirmed that the courts of one state may enjoin the prosecution of a judicial proceeding in another state upon substantially the same grounds that the courts of one nation may enjoin the prosecution of a suit or action in the courts of another nation. It will be found, upon an examination of the decisions upon this subject, that it is not necessary, in order to obtain relief, to establish the usual grounds for equitable interposition, namely, fraud, accident, or mistake, but that it will be sufficient to entitle a citizen of a state to injunction preventing another citizen thereof from prosecuting an action against the former in the courts of another state to show that the purpose or necessary effect of such action is to obtain an advantage to which the plaintiff therein is not entitled in the domicile of the parties."

The Maryland Court of Appeals, in Miller v. Gittings, 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352, after a full investigation of the question, said:

"The authorities show that equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice, or unconscientious advantage; and most especially where there is an attempt to evade or defeat the operation of the laws of the state where both parties to the suit reside."

In Bigelow v. Old Dominion Copper Co., 74 N. J. Eq. 457, 71 Atl. 153, the New Jersey court said, speaking through Justice Pitney:

"I have not the least doubt or difficulty about the power of a court of equity in one state to restrain its own citizens, or other persons within the control of its process, * * * or in foreign countries. The power proceeds from the undoubted authority that a court of equity possesses over persons within its jurisdiction to restrain them from doing anything that is contrary to equity and good conscience, to the wrong and injury of others, whether the threatened inequitable conduct consists in the prosecution of an action or whatever it may happen to be. The court of equity thus appealed to acts in personam, and it is immaterial whether the threatened inequitable conduct is to be carried on within or without the limits of the jurisdiction."

In Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534, the Minnesota court said, in upholding the right to enjoin the prosecution of a suit in other states, that—

"The power of the court thus to enjoin the appellant is undoubted. All the parties to this action are citizens of this state, and subject to the jurisdiction of the court. The facts that the land is in another state, and the action which the appellant is forbidden to further prosecute is there pending, do not affect the question of the power of the court in the premises. The court, in such a case, simply commands its own citizens, not the courts of another state. A court of equity of this state has the power and will restrain its own citizens, of whom it has jurisdiction, from prose-

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cuting suits in the courts of other states and foreign jurisdictions, whenever the facts of the case make such restraint necessary to enable the court to do justice, and prevent one citizen from obtaining an equitable advantage over other citizens."

In Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538, the Supreme Court of the United States, after an exhaustive consideration of the subject, said, in upholding the jurisdiction of the Massachusetts court to restrain a citizen of that state from prosecuting a suit against another citizen of that state in a New York court, that—

"It is now held that, whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country. * * *

"Such is undoubtedly the result of the clear weight of authority, and the rule has been often applied by the courts of the domicile against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others."

Further citation of authority in support of the jurisdiction exercised by the lower court in this case would unnecessarily incumber this opinion, because there is, as we have said, no dispute as to the power of the court in a proper state of case to enjoin a citizen of the state from prosecuting against another citizen of the state a suit in the courts of another state. And the railroad company was, in the meaning of the law and by the express provision of section 841 of the Kentucky Statutes, a citizen of this state.

[3] This conclusion brings us to the consideration of the question raised by counsel for appellant that, as the federal Employers' Liability Act authorized the administratrix to bring this suit in the state of Minnesota, the Kentucky court had no power to enjoin her from prosecuting the suit that she had lawfully brought in the state of Minnesota.

The federal Employers' Liability Act, under which the suit was brought, as amended, provides that—

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." U. S. Comp. St. 1916, § 8662.

It will be observed that this statute fixes the venue of the action when it is brought in a circuit Court of the United States at three places, and further provides that the jurisdiction of the courts of the United States shall be concurrent with that of the courts of the several states; thus, as we think, permitting the action to be brought in a state court at any place where it might be brought in a Circuit Court of the United States; and, this being so, under the admitted facts the Minnesota state court had jurisdiction, as the railroad company was doing business in the federal district in which the action was brought at the time of its commencement.

[4, 5] We do not, however, give to this statute the peremptory effect claimed for it by counsel for the administratrix, or agree with their contention that, as it was allowable under the act to bring this suit in the state of Minnesota, therefore the plaintiff could not be restrained by injunctive process from prosecuting it to a conclusion in that state.

The action was a transitory one, and, except for the provisions of the act limiting the places where it might be brought, it could have been

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brought in any court having jurisdiction at any place where the railroad company could have been brought before the court by process.

Extensive citation of authority in support of this proposition is unnecessary, as it is agreed everywhere that an action for tort such as this was may be brought at any place where the defendant may be found and served. 40 Cyc. 107.

The federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience.

Before the passage of this act, the plaintiff had exactly the same legal right to institute her action in any court having jurisdiction, in which the railroad company could have been brought before the court, as she does now bring it in the three places specified in the act.

It therefore seems to us that, if it was allowable in a proper state of case before the act to enjoin the plaintiff from bringing a suit in a court and at a place where under the law she had the right to bring it, it must be equally allowable to do so since the act, because the act merely limits instead of enlarging the places where the suit must be brought, and it confers no more right to bring the suit in the places named in the act that the general law before the act conferred the right to bring the suit at any place where the defendant could be brought before a court having jurisdiction.

[6] The remaining question is: Did the averments of the petition, which were fully supported by the evidence, warrant the McCracken circuit court in granting the injunction? If they did, the judgment below should be affirmed. Aside from the question of comity between the states, and the reluctance that the courts of one state naturally have to interfere with the prosecution of actions in the courts of another state, it is a serious and delicate matter for a court to thus restrain a citizen from the exercise of a privilege given to him by the law merely upon the ground that in exercising it he may subject his adversary to greater expense and inconvenience than he would suffer if the suit had been brought in another place.

Accordingly, this extraordinary relief will only be granted when the facts plainly show that the institution of the suit in the foreign state was for the purpose of securing to the plaintiff some unfair or unconscionable advantage arising either under law or fact, or that the prosecution of the suit in the foreign state would subject the defendant to such great and unnecessary inconvenience and expense as to make it appear that the foreign forum was selected for the purpose of vexatiously harassing the defendant.

In 14 R. C. L. 415, the rule is thus stated:

"As a general rule, the court will consider the purpose of the parties and the object sought to be accomplished by appealing to a court of another state, and, in case it appears that the interposition of the court is necessary to prevent an inequitable thing, something contrary to good conscience, it may grant the relief asked. Therefore it is recognized that a court of equity in one state has power to restrain its own citizens, of whom it has jurisdiction, from prosecuting suits in the courts of other states, whenever the facts of the case make such restraint necessary to enable the court to do justice and prevent one citizen from obtaining an inequitable advantage over other citizens."

Supporting this rule, which is in full accord with the overwhelming weight of authority, reference may be had to the following cases: Mason v. Harlow, 84 Kan. 277, 114 Pac. 218, 33 L. R. A. (N. S.) 234; Hawkins v. Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534; Bigelow v. Old Dominion Copper Co., 74 N. J. Eq. 457, 71 Atl. 153; O'Haire v. Burns, 45 Colo. 432, 101 Pac. 755, 25 L. R. A. (N. S.) 267, 132 Am. St. Rep. 191.

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Having this view of the law controlling the case, we will now take up the arguments of counsel in support of the judgment.

[7] It is urged that the injunction should have been granted on account of the plainly unlawful and scandalous manner in which Anderson secured employment in the case and was authorized to bring the suit in the state of Minnesota. But we doubt if this conduct of Anderson, in itself and independent of other circumstances, would furnish ground for the relief obtained in the lower court. Courts cannot control litigants in their choice of attorneys or dictate what attorneys they shall employ in their private business. The mere fact that the litigant sees proper to engage the services of an attorney who is able to secure the employment by such unprofessional and reprehensible methods as Anderson resorted to, and which would result in his prompt disbarment if an attorney in this state (as may be seen by an examination of the case of Chreste v. Commonwealth, 171 Ky. 77, 186 S. W. 919, Id., 178 Ky. 311, 198 S. W. 929), is no ground in itself for restraining the litigant from bringing a suit where the law gives him the right to bring it. Although it should here be said that the manner in which the employment was secured by Anderson and the bringing of the suit in a distant state at his instigation are weighty circumtances to be considered in connection with others in determining whether the relief sought by the railroad company should have been granted.

[8] It is also pressed on our attention that there is no merit in the case for the plaintiff, as the evidence in the record shows that the death of Reed was caused purely by his own negligence, and hence there could be no recovery in behalf of his administratrix. Whether this is so or not we are not prepared to say, because there is no evidence in the record for the administratrix showing how Reed came to his death. But aside from this we may pass this argument with the statement that the mere fact that the plaintiff might fail in her suit would not in itself be sufficient grounds to enjoin her from bringing it in any forum she had the right to select.

[9] Nor do we attach controlling importance to the evidence appearing in the record and argument of counsel thereon that the practice and procedure in the Minnesota courts is more favorable to plaintiffs in damage suits than the practice and procedure in the courts of this state. We assume that both parties to this litigation would be given as fair a trial in the courts of the state of Minnesota as they would in the courts of this state; and, as the accident that resulted in the death of Reed occurred in this state, the right of plaintiff to recover and the liability of the railroad company would be determined in the Minnesota court according to the laws of this state. Northern Pac. R. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Louisville & Nashville Railroad Co. v. Smith, 135 Ky. 462, 122 S. W. 806; Illinois Central Railroad Co. v. Jordan, 117 Ky. 512, 78 S. W. 426, 25 Ky. Law Rep. 1610; Louisville & Nashville Railroad Co. v. Keiffer, 132 Ky. 419, 113 S. W. 433.

[10] In addition to this, and aside from the difference there may be in the Minnesota and Kentucky practice, the substantive law of the case would be administered and applied in the courts of Minnesota as it would be administered and applied in the courts of this state, because the action was brought under the federal Employers' Liability Act, which insures uniformity of substantive law in every court and every state in which such an action may be brought. Central Vermont Railroad Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; Norfolk Southern R. R. Co. v. Ferebee, 238 U. S. 269, 35 Sup. Ct. 781, 59 L. Ed. 1303.

[11] Neither could there be a judgment for the plaintiff, in the absence of evidence tending to show negligence on the part of the railroad company that resulted in the death of Reed, because the act expressly provides that the carrier "shall be liable in damages * * * for injuries

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or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," so that the plaintiff's right of recovery in every case depends on his ability to show negligence on the part of the carrier. If he fails to show negligence on the part of the carrier, there is no liability. Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 Supp. Ct. 406, 60 L. Ed. 732; Chicago, Rock Ilsand Ry. Co. v. Wright, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; Cincinnati, New Orleans & Texas Pacific Railway Co. v. Swann's Adm'x, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27.

[12] We therefore put aside as not of controlling importance all of the grounds relied on by counsel for the railroad company to support the judgment appealed from, except the single one that the suit was brought in Minnesota for the sole purpose of subjecting the company to great and unnecessary expense and inconvenience, and to vexatiously harass and annoy it, and all this without securing to the administratrix any material benefit.

On this ground we think the company was entitled to the relief obtained and believe that a brief summing up of the facts appearing in the record will demonstrate the soundness of the conclusion we have reached.

Here we have the case of a railroad employee who was killed as a result of his own or the company's negligence, and it is not material which, so far as this suit is concerned.

He was a citizen of this state and resided at the place where he came to his death, and there his widow, who was also a citizen of this state, resided, as well as all the witnesses who might be needed by either of the parties to this litigation.

His widow qualified as administratrix in the county where she lived, and in that county there was a circuit court of general jurisdiction almost continuously in session, in which she could have filed her suit for damages and obtained a speedy trial with little expense or inconvenience to herself, or the company, or the witnesses for either.

Under the laws of this state, and the practice and procedure in its courts, her chances of recovery would be as good as in the courts of the state of Minnesota; but notwithstanding these favorable conditions and surroundings, she was persuaded by Anderson to bring her suit in the state of Minnesota about 1,000 miles distant from her home, the place of the accident, and the residence of all the witnesses for both parties.

We say she was persuaded by her attorney to do this because it is inconceivable that this woman, under the undisputed facts as we have stated them, would freely or voluntarily leave her home and go to a distant state to bring this suit. But whether this be so or not, she must be answerable for what her attorney procured her to do. Of this we have no doubt, because all the harm that it was sought to subject the railroad company to was done in her name, and only by acting upon her could the wrong be corrected.

Under these circumstances, we may well believe, and do so, that the administratrix, under the influence of Anderson, was induced to bring the suit in Minnesota in order that the railroad company might be subjected to great and unnecessary expense and inconvenience and for the purpose of vexatiously harassing and annoying it. Probably Anderson adopted this course with the expectation that the railroad company, rather than go to the expense and inconvenience that would attend its defense of the case in the Minnesota court, would pay a substantial sum in settlement; but, whether this was the moving cause or not, it seems clear to us that the only purpose of bringing the suit in the Minnesota court was to harass and annoy the company and subject it to as much expense and inconvenience as possible.

Accordingly, we think the judgment below correct.

[13] It is, however, proper that we should say that the judgment in this suit will not bar the administratrix from bringing in this state within

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the time allowed by the act, after excluding the period during which she was restrained by the injunction, another suit against the railroad company to recover damages for the death of Reed, because it is provided in section 2544 of the Kentucky Statutes that—

"In all cases where the doing of an act necessary to save any right or benefit is restrained or suspended by injunction or other lawful restraint, vacancy in office, absence of an officer, or his refusal to act, the time covered by the injunction, restraint, vacancy, absence, or refusal to act shall not be estimated in the application of any statute of limitations."

And as the plaintiff was restrained by injunction from prosecuting her suit which was brought in seasonable time, this statute saves the cause of action from being barred by limitation during the pendency of the injunction.

The judgment is affirmed.

SUPREME COURT OF LOUISIANA.

BERGERON

v.

TEXAS & P. RY. CO. (No. 22857.)*

2. MASTER AND SERVANT — EMPLOYERS' LIABILITY ACT — APPLICATION—INTERSTATE COMMERCE.

State Employers' Liability Act, as amended by Act No. 243 of 1916, which by section 30 of original act excludes its application to any employer acting as a common carrier in interstate commerce by railroad, does not apply where a deceased servant's employer was so engaged, regardless of whether servant's work was a part of railroad's interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Joseph E. Le Blanc, Judge.

Suit by Mrs. Milda Bergeron, widow, for herself and on behalf of her children, for compensation under the state Employers' Liability Act for the death of her husband, a yard foreman, against the Texas & Pacific Railway Company. Judgment for the widow and children, and defendant appeals. Judgment annulled and plaintiff's demand rejected and suit dismissed.

Howe, Fenner, Spencer & Cocke, of New Orleans, and Albin Provosty, of New Roads, for appellant.

W. P. Obier, Charles E. Schwing, and J. H. Pugh, all of Plaquemine, for appellee.

O'NIELL, J. The plaintiff's husband was run over and killed by a switch engine of the defendant company while he was performing his duties as yard foreman, employed by the company. The railway company is a common carrier, and was engaged in interstate as well as intrastate

* Decision rendered, Nov. 4, 1918. Rehearing denied, Dec. 2, 1918. 80 South. Rep. 262. Syllabus by Editorial Staff.

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commerce at the time of the accident. The eastern terminus of the road is at New Orleans, La., and the western terminus at El Paso, Tex. The accident happened at Addis, La., a junction point on the main line, through which pass interstate freight and passenger trains of the defendant company, and where the defendant has extensive railroad yards.

This suit was brought by the widow, for herself and on behalf of her children, for compensation under the Employers' Liability Act, the Act No. 20 of 1914, as amended by the Act No. 243 of 1916. Judgment was rendered in favor of the widow and children, giving them compensation at the rate of $8 per week for 300 weeks, and $64.75 for the expenses of the funeral of the deceased employee. The defendant prosecutes this appeal.

[1] Appellant's defense is that the Employers' Liability Act of the state does not apply to an employer engaged in interstate commerce as a common carrier by railroad. It is conceded by the learned counsel for appellee that the statute would not afford a right of action for compensation in this case if the work in which the deceased employee was engaged at the time of the accident was a part of the interstate commerce in which the railway company was engaged. That is because the liability of interstate railroad carriers for compensation for personal injuries suffered by their employees while engaged in interstate commerce is regulated by the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]); and, as Congress has exercised legislative authority covering the subject, there is no authority for state regulation, even with regard to injuries occurring without fault, as to which the federal law does not afford a remedy. See New York Central Railroad Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139.

[2] Appellee's contention, however, is that the work of the yard foreman was not a part of the interstate commerce in which the railroad company was engaged. There is some doubt on that question, which, however, we have no occasion for deciding; for the fact that the employer was engaged in interstate commerce as a common carrier by railroad is sufficient, in our opinion, to deprive the appellee of a right of action for compensation under Act No. 20 of 1914. Section 30 of the act provides :

"That this act shall not be construed to apply to any employer acting as a common carrier while engaged in interstate or foreign commerce by railroad, which employer, by reason of being engaged in interstate or foreign commerce by railroad, is not subject exclusively to the legislative power of the state of Louisiana, or for which employer and the employee thereof a rule of liability or method of compensation has been, or may be, established by Congress of the United States; nor shall it apply to any employee of such common carrier injured or killed while so employed."

The defendant, being a common carrier engaged in interstate commerce by railroad, is not subject exclusively to the legislative power of the state of Louisiana. In fact, legislative control of the road, in some respects, had been exercised by the Congress of the United States before this case arose. The railroad rates, for example, are regulated by the Interstate Commerce Commission. The hours of service for railroad employees are limited by acts of Congress. The railroad equipment must conform to federal Safety Appliance Acts. And the railroad company's liability for personal injuries is regulated by the federal Employers' Liability Act.

[3] We have no doubt that the Congress of the United States has legislative power to establish a rule of liability of railroads engaged in interstate commerce, and to establish a method of compensation for personal injuries suffered by the employees of railroad companies so engaged, even as to employees whose work is not, of itself, interstate com-

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merce, and even as to injuries occurring without fault. On that question the Supreme Court of the United States, in Behren's, Administrator, v. I. C. Railroad Co., 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, declared:

"Considering the statutes of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating and dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce."

[4] And, with regard to the federal Safety Appliance Act (Act March 2, 1893, as amended by Acts April 1, 1896, March 2, 1903, and April 14, 1910 [U. S. Comp. St. 1916, § 8605 et seq.]), in Texas & Pacific Railway Co. v. Rigsby, 241 U. S. 33, on page 41, 36 Sup. Ct. 482, 60 L. Ed. 874, it was said that although it might be conceded, for the sake of argument, that the mere question of compensation for injuries to persons engaged in intrastate commerce was of no concern to Congress, the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding interstate commerce was a matter within the control of Congress, and that the right of private action by an employee injured while engaged in duties not connected with interstate commerce, but injured because of a defect in a safety applicance required by the act of Congress to be made safe, was so intimately related to the operation of the act, as a regulation of interstate commerce, that it was within the constitutional grant of legislative authority over the subject.

The Employers' Liability Act of this state, unlike the statutes of some other states on the subject, is not so worded that a case must come within the provisions of the federal Employers' Liability Act to be excluded from the operation of the state statute. In its precise terms, the state statute does not apply to employers engaged in interstate commerce as common carriers by railroad, because railroads engaged in interstate commerce are not subject exclusively to the legislative power of the state, and because, for them and for the employees thereof, the Congress of the United States has authority to establish a rule of liability or method of compensation for personal injuries suffered by the employees.

Our conclusion is that the Employers' Liability Act of this state, on which alone the plaintiff rests her claim, does not give her a right of action for compensation.

The judgment appealed from is annulled, and the plaintiff's demand is rejected, and her suit dismissed at her costs.

Provosty, J., absent on account of illness, takes no part.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

MARTIN'S CASE.

IN RE EMPLOYERS' LIABILIITY ASSUR. CORPORATION, LTD.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL FROM DECISION OF INDUSTRIAL ACCIDENT BOARD.

Where attorney for servant's widow presented to superior court copies of pertinent papers on file with Industrial Board, stating he wished to appeal to Supreme Judicial Court from decision of board, there was no appeal to Supreme Judicial Court; Compensation Act, pt. 3, § 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7, providing appeal only from decree of superior court.

(For other cases, see Master and Servant, Dec. Dig. § 418[3½].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL FROM DECREE OF SUPERIOR COURT—OBJECTIONS TO ENTRY OF DECREE.

Where attorney for servant's widow, desiring to appeal to Supreme Judicial Court, filed in superior court objections to entry of decree confirming order of board, he did not thereby appeal from decree of court to Supreme Judicial Court.

(For other cases, see Master and Servant, Dec. Dig. § 418[3½].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONVERSION INTO APPEAL OF OBJECTIONS TO ENTRY OF SUPERIOR COURT'S DECREE.

Where attorney for servant's widow, desiring to appeal to Supreme Judicial Court, filed in superior court objections to entry of decree confirming finding of board, judge of superior court, by noting that he regarded attorney as taking appeal from decree to Supreme Judicial Court, could not convert objections into appeal.

(For other cases, see Master and Servant, Dec. Dig. § 418[3½].)

Appeal from Superior Court, Suffolk County.

Proceedings for compensation under the Workmen's Compensation Act for the death of Fred Martin, the employee, by his widow, Mrs. Ida Martin, opposed by the Edison Electric & Illuminating Company, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer, wherein Marcellus Coggan, attorney for the widow, attempts to appeal from a decision of the Industrial Accident Board, confirmed by the superior court, that he return to the widow the sum of $100 paid him by her. Case dismissed.

Coggan & Coggan and Chas. F. Lovejoy, all of Boston, for Marcellus Coggan.

Wilfred B. Keeman, of Boston, for dependent.

RUGG, C. J. [1] This was a proceeding before the Industrial Accident Board. It related to fees to be allowed to an attorney for services

* Decision rendered, Dec. 7, 1918. 121 N. E. Rep. 152.

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rendered to the dependent widow of a deceased employee. The attorney presented to the superior court copies of pertinent papers on file with the Industrial Accident Board, together with the statement that "he wishes to appeal to the Supreme Judicial Court from the decision of the Industrial Accident Board." That was not an appeal to this court. The Workmen's Compensation Act makes no provision for an appeal from a decision of the Industrial Accident Board to this court, but for an appeal to this court only from a decree of the superior court. St. 1911, c. 751, pt. 3, § 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7. Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372.

[2] The matter was heard in the superior court and a decree was entered in accordance with the finding of the Industrial Accident Board on February 6, 1918. On the same date the attorney filed in the superior court a paper entitled "Objections to Entry of Decree by said Superior Court." The title appropriately describes the contents of the paper, which set forth several grounds as "reasons for his objections and motion for review." It was denied. This paper was not either in form or substance an appeal from the decree.

[3] On March 2 there was a "Memo." filed by the judge of the superior court in these words: "I understood and regarded the respondent Coggan as claiming and taking an appeal by this paper." This statement adds nothing to the force of the paper. The judge of the superior court had no power to convert a paper which was in no sense an appeal from the decree into such an appeal. He could not affect the rights of the parties in any such way. Herrick v. Waitt, 224 Mass. 415, 417, 113 N. E. 205; Boston Bar Association v. Casey, 227 Mass. 46, and cases collected at page 51, 116 N. E. 541. No validity was added to the proceedings by the filing by the attorney on March 2, 1918, of further "Objections to Entry of Decree by said Superior Court." That also was neither in form or substance an appeal from the decree of the superior court. An appeal not taken according to law is not rightly before us and cannot be considered. Humphrey's Case, 226 Mass. 143, 115 N. E. 253; Rutland v. Hein, 231 Mass. 242, 120 N. E. 590.

Case dismissed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

WORCESTER.

COURTNEY'S CASE.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT OF SERVANT—PROCEEDING.

Where agreement between injured servant and insurer has not been filed with and approved by Accident Board, under St. 1912, c. 571, § 9, servant cannot, after six months from time of injury (part 2, § 5, as amended by St. 1912, c. 571, § 5), proceed under Workmen's Compensation Act, pt. 3, § 5, as amended by St. 1917, c. 297, § 2, providing that if association and servant fail to agree as to compensation, or disagree as to continuance of payments, either party may notify Accident Board, etc.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

* Decision rendered, Jan. 2, 1919. 121 N. E. Rep. 426.

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Appeal from Industrial Accident Board.

Proceeding for compensation under the Workmen's Compensation Act by Thomas Courtney, the employee, opposed by the Worcester Gaslight Company, the employer, and the Massachusetts Bonding & Insurance Company, the insurer. Compensation was awarded, the award confirmed by decree of the superior court, and from its decree the insurer appeals. Decree reversed.

Alexander H. Bullock and John M. Thayer, both of Worcester, for insurer.

John H. Reid, of Worcester, for employee.

LORING, J. On November 25, 1916, Courtney met with an accident in the course of and arising out of his employment by the Worcester Gaslight Company. On June 13, 1917, he retained counsel and on July 20, 1917, i. e., at the end of 34 weeks after the accident, he was paid $320 by the superintendent of the Gaslight Company and signed an agreement for compensation which is not set forth in the record. On August 28, 1917, the insurance company notified the superintendent to discontinue further payments and no further payments have been made. On September 28, 1917, the employee "at the suggestion of the Industrial Accident Board" filed a claim for compensation. On October 3, 1917, he was given light work by the Gaslight Company and is still in their employ.The Board found that the employee had reasonable cause for failure to file claim before September 28, 1917, because the insurer through the superintendent of the Gaslight Company, "its authorized agent," "had entered into an agreement in regard to compensation." They also found that the insurance company had declined to make any payments after July 20, 1917, notwithstanding the provisions of Workmen's Compensation Act (Laws 1911, c. 751) pt. 2, § 4, as amended by St. 1916, c. 90. The award ended wth a finding that the employee was entitled to $10 a week from July 20, 1917, to October 3, 1917, and to a weekly payment of $2 a week from October 3, 1917, to January 24, 1918, amounting in all to $139.43. Upon this award the superior court made a decree that the insurer pay the employee $139.43 and continue payment of $2 a week "in accordance with the requirements of the act." The employee in this court put his case on the ground that there was evidence justifying the finding that the superintendent of the Gaslight Company was authorized to make the agreement of July 20, 1917, in behalf of the insurance company and "that the filing of the claim for the compensation on September 28, 1918, has no bearing on the case. It was filed at the suggestion of the Industrial Accident Board, the insurer having requested a hearing. The right to compensation had been concluded previous to this time by the signing of the agreements and receipt, and the giving and acceptance of $320." That is to say, in this court the employee has elected to proceed under the latter part of Workmen's Compensation Act, pt. 3, § 5, as amended by St. 1917, c. 297, § 2.† But the plaintiff cannot proceed under that provision of the act because the agreement of July 20, 1917, has not been filed with and approved by the Industrial Accident board in accordance with the provisions of St. 1912, c. 571, § 9.

† Part 3, § 5, as amended by St. 1917, c. 297, § 2, is as follows: "If the association and the injured employee fail to reach an agreement in regard to compensation under this act, or if they have reached such an agreement, which has been signed and filed in accordance with the provision of this act, and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payments under such agreement, either party may notify the Industrial Accident Board which shall thereupon assign the case for hearing by a member of the board."

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Under these circumstances it is not necessary to determine whether the evidence justifies the finding that the superintendent of the Gaslight Company was the authorized agent of the insurance company and if he was whether he had authority to make this agreement after the six months had expired during which the employee was bound to bring his complaint in the absence of mistake or other reasonable cause as required by part 2, § 5, as amended by St. 1912, c. 571, § 5.

Decree reversed.

SUPREME COURT OF MICHIGAN.

ADAMS

v.

W. E. WOOD CO. ET AL. (No. 24.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INDUSTRIAL ACCIDENT BOARD—PRACTICE.

Where the Industrial Accident Board reopened a case for consideration on the merits, to which defendants, employer and insurer, did not then object, but took part in the proceedings, and defendants do not appear to have asked to reopen the case, or to have further proofs, their later objection to the reopening is without merit.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—INJURY TO SERVANT—INDUSTRIAL ACCIDENT BOARD—JURISDICTION.

Where employer and employee file their written agreement for compensation with the Industrial Accident Board and it is approved, jurisdiction of the parties is thereby conferred upon the board.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

3. MASTER AND SERVANT—SETTLEMENT RECEIPT—FILING AND APPROVAL.

In a proceeding for additional compensation, a settlement receipt, neither filed nor approved by the Industrial Accident Board, does not prevent action by the board.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

4. MASTER AND SERVANT—AGREEMENT AS TO COMPENSATION—JURISDICTION OF INDUSTRIAL ACCIDENT BOARD.

Where a servant had a written agreement with the master and insurer as to payment of award, but the parties did not agree as to the time the servant was entitled to such payments, the question was a proper one for the Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

5. MASTER AND SERVANT—CAUSE OF INJURY—FINDINGS—EVIDENCE.

A findng of the Industrial Board that an injury to a servant, received while in the employment of defendant master, and for which payments

* Decision rendered, Dec. 27, 1918. 169 N. W. Rep. 845.

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were being made under an award, contributed to a later injury received while on a street car and was aggravated by it, *held* not unsupported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

6. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD —PRESUMPTION.

It must be presumed upon certiorari to the Industrial Accident Board that the board gave due consideration to a question of fact in issue.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Certiorari to Industrial Accident Board.

Application by Merve Adams to reopen case before the Industrial Accident Board and for additional compensation, opposed by the W. E. Wood Company, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurer. From an order reopening the case and an award of additional compensation, the employer and insurer bring certiorari. Order of the Industrial Accident Board affirmed.

Argued before Ostrander, C. J., and Bird, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Kerr & Lacey, of Detroit, for appellants.

Campbell, Dewey & Stanton, of Detroit, for appellee.

BIRD, J. This is a review, by defendants, of an order of the Industrial Accident Board awarding to plaintiff additional compensation for injuries which he received while in the employ of the defendant, W. E. Wood Company.

Plaintiff is a brick mason by trade, and about 37 years of age. He resides and works in the city of Detroit. On March 7, 1917, at the intersection of Farmer street and Lafayette boulevard, he slipped and fell, dislocating his left shoulder. His injury resulted in a partial paralysis of his left hand or fingers. This incapacitated him from following his trade for the time being, so he sought and obtained a position with defendant, W. E. Wood Company, as watchman. He commenced this employment on April 9, 1917. On April 23d, while at his regular work, he had occasion to close a gate or door which hung on rollers. In doing so, it jumped the track and fell on him, breaking his left arm six or seven inches above the elbow and otherwise injuring him. He demanded compensation from his employer, and an agreement was reached whereby he was to receive $10 per week. This agreement was filed with and approved by the Industrial Accident Board. Weekly payments were made under this agreement up to July 17th, at which time the attending physician indicated to plaintiff that he was in a condition to resume his work of night watchman. Acting on this suggestion he boarded a street car and went to defendant's plant to make arrangements to take up his work again. In passing out of the car door he was shoved or crowded by fellow passengers against the door casing, and suffered another fracture to his left arm. Whether the arm was refractured at the point of the break or further down near the elbow is in dispute. Plaintiff, being unable to resume his work, requested further compensation from his employer, but this was refused on the ground that he had signed a settlement receipt when the last payment was made to him in July. On October 31st he filed this application with the board, praying that his case be reopened and additional compensation allowed. At the hearing the facts were placed before the board and a finding was made, in substance as follows:

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"(a) That at the time of signing said settlement receipt said applicant had not recovered from the injury sustained on April 23d while employed by respondent.

"(b) That he had not actually resumed his employment.

"(c) That his injuries of April 23d were aggravated by another injury which he received on the street car July 17th while on his way to defendant's plant to resume his employment, and that this occurrence increased the period of applicant's disability which he received on April 23, 1917.

"(d) That the injury which he received on April 23d was the proximate cause of the street car injury.

"(e) That the board has serious doubts whether applicant was able to resume his work on July 17th or on September 15th."

Upon these findings an award was made granting plaintiff compensation at the rate of $10 per week from the time the payments were stopped on July 17th up to and including September 15, 1917, amounting to $86.66, which sum was ordered to be paid presently. It was further ordered:

"That if it should develop that applicant is not able to resume or continue in the employment in which he was engaged at the time of the accident, April 23, 1917, because of physical disability chargeable to said accident, said applicant is to be paid compensation from and after September 15, 1917, according to the terms of the agreement approved by the board May 25, 1917."

Defendants have assigned error on this order, as follows:

"(1) The Industrial Accident Board did not have authority or jurisdiction to enter an order directing respondents and petitioners to pay further compensation to applicant.

"(2) There is no testimony upon which the award of the Industrial Accident Board can be based.

"(3) The Industrial Accident Board erred in holding that injury received by applicant as a result of accident of April 23, 1917, while in the employ of said respondents was aggravated by street car accident of July 17, 1917.

"(4) The Industrial Accident Board erred in holding that injury received by applicant while in the employ of the respondents on April 23, 1917, was the proximate cause of the street car accident of July 17, 1917.

"(5) The Industrial Accident Board erred in concluding, 'And the board also very much doubts that applicant was on July 17, 1917, or on September 15, 1917, or is now, in such condition as to be able to resume his occupation as a watchman.'

"(6) The Industrial Accident Board erred in ordering respondents to pay compensation to said applicant from July 17, 1917, up to and including September 15, 1917."

[1] 1. Counsel argue that the board had no right to consider the merits of plaintiff's claim in response to an application to reopen his case. The board returns that it is its customary practice to consider the merits upon an application to reopen a case; that it was followed in this case, and defendant's counsel took part in the proceedings, introduced proofs, argued the case upon the merits, and offered no objection to the practice. It does not appear that counsel have petitioned the board to reopen the case to admit further proofs; neither does it appear that they have any further material proofs to submit. Under these circumstances we think the claim is without merit.

[2, 3] 2. It is said there is no testimony upon which the award of the Industrial Accident Board can be based. Under this head it will be proper to consider the other questions raised. When the employer and employee agree upon compensation and file their written agreement with the Industrial Accident Board and it is approved, jurisdiction of the parties is thereby conferred upon the board to act in the premises. The

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method by which the settlement receipt was obtained is questioned by plaintiff, and also by the board. We see no occasion to discuss this question further than to say that, inasmuch as the settlement receipt was not filed and approved, the board would be in no wise concluded by it.

[4] It appears to be conceded that plaintiff was injured and entitled to compensation. The disagreement arises over the length of time he was entitled to it. In the event the parties could not agree as to this, it was a proper question for the board to determine. This the board did do, but counsel argue that its finding is not supported by the testimony.

[5] It appears without question that plaintiff was severly injured on April 23d, and that on July 17th he was still under the doctor's care and his left arm was in a sling, and that he was unable to make any use of it. The doctor advised him, at about this date, that he thought he could resume his work of watchman if he were careful. The doctor does not say he had fully recovered. Acting on the doctor's suggestion, plaintiff started for his place of employment, but was injured before reaching there. He submitted this third injury to Dr. Hall, defendant's physician, and he remarked "that it was as bad as ever," and continued to treat him for several weeks thereafter. Dr. O'Donell, who treated him for the injury of March 7th, testified that the numbness of the fingers was probably due to an injury to the nerves when the shoulder was dislocated; that at the end of five or six weeks of treatment the injury was progressing nicely, with good prospects for complete recovery. He also testified he had examined him within two or three days of the hearing, and his arm at that time had lost 100 per cent. of its usefulness, and, in his judgment, would never be any better. Measuring plaintiff's condition as described by Dr. O'Donell before his employment with defendant with his condition as described on July 17th, we think it is open to a reasonable inference that plaintiff had not recovered on July 17th from his injuries of April 23d. Neither do we think the inference of the board that the injury of April 23d contributed to the injury of July 17th and was aggravated by it is unsupported by the evidence.

[6] Just to what extent plaintiff's present condition is due to the original injury is somewhat difficult to determine. It may be inferred from Dr. O'Donell's testimony that the effect of the injuries of March 7th would have disappeared had it not been for the injury of April 23d. This, however, was a question of fact, and we must assume that due consideration was given to it by the board.

The order of the Industrial Accident Board is affimed.

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SUPREME COURT OF MICHIGAN.

GAFFNEY

v.

GOODWILLIE BROS. (No. 82.)*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION— REVIEW OF FINDINGS OF INDUSTRIAL ACCIDENT BOARD.

That reviewing court is satisfied that it would not reach the conclusion reached by the Industrial Accident Board is not conclusive in determining whether there is testimony supporting finding and conclusion of such board.

(For other cases, see Master and Servant, Dec. Dig. 417[7].)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION— AWARD—REVIEW.

Disputed question being whether accident caused employee's illness and death, award will not be set aside by reviewing court, where, although testimony cannot be harmonized, there is ground for saying that Industrial Accident Board had before it some evidence tending to prove that accident set up a train of physical disturbances, affecting an existing pathological condition in such way as to cause death.

(For other cases, see Master and Servant, Dec. Dig. 417[7].)

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION— CERTIORARI—MATTERS REVIEWABLE.

Contention that imposition of penalty, pursuant to Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10) pt. 3, § 17, upon defendant employers for failure to report accident, is wrong, will not be considered by reviewing court, where order made by Industrial Accident Board makes no reference to penalty; court being concerned only with orders made by board.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Certiorari to Industrial Accident Board.

Proceeding for compensation under the Workmen's Compensation Act by Ellen Gaffney, widow of John Gaffney, deceased employee, opposed by Goodwillie Bros., employers. The Board of Arbitration refused to award compensation. Upon a review by the Industrial Accident Board, the finding was reversed, and compensation allowed, and the employers bring certiorari. Affirmed.

Argued before Bird, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

James C. Wood, of Manistique, for appellants.
Virgil I. Hixson, of Manistique, for appellee.

PER CURIAM. The Board of Arbitration refused, two to one, to award compensation. Upon a review by the Industrial Accident Board, the finding was reversed and compensation allowed. It is admitted that the claimant's widow of the deceased, John Gaffney, that John Gaffney was employed by Goodwillie Bros., and that both the employer and em-

* Decision rendered, Dec. 27, 1918. 169 N. W. Rep. 849.

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ployed were governed by the Workmen's Compensation Law; that on October 20, 1916, John Gaffney suffered an accidental personal injury arising out of and in the course of his employment; that John Gaffney has since died; that, if the claimant is entitled to compensation, the award should be for 300 weeks at $5.77 per week. It is not admitted, but is denied, that John Gaffney upon the said occasion received any considerable injury, one that disabled him or resulted in his death. What happened, and the testimony is not in dispute, was that, in taking a board from a machine, another board following it through, the machine pushed the board in Gaffney's hands with such force that he was obliged to step back from the machine, or was pushed back from the machine, against and over and upon a truck, from which he fell or rolled to the floor. He immediately arose and resumed work, without complaint, except to say that his right hip was hurt. This was early in the forenoon. He worked the remainder of the day. He died December 29, 1916, having been ill from and after October 20, 1916. All the testimony supports the conclusion that he was a sick man on Monday, October 23, 1916, suffering acutely, and thereafter, with variations of acute symptoms, until he died.

Whether what happened to Gaffney at his work, on October 20th, caused his illness and death, is the subject to which a considerable mass of testimony, medical and other, is addressed. In a lengthy finding and opinion, the board has set out its reasons for awarding compensation, in the course of which occurs the following:

"It is pretty difficult to say just how hard the man was struck, shoved, or pushed, but the fact remains that he was struck, shoved, or pushed, and went backward 3 feet, and fell upon a truck 12 or 15 inches high, and rolled over it and fell upon the floor. The board is convinced that the accident was a somewhat serious one, taking all of the testimony into consideration, and that it did injure the deceased very seriously and severely. * * *

"We are all satisfied that the factor which caused this man's death was the accidental, personal injury he received in the respondent's plant, on October 20, 1916. * * *

"In this case it is probably impossible to say, with absolute surety, what caused John Gaffney's death; but the Board is satisfied that the most probable cause is the accidental personal injury he received in the employ of the respondents. That injury might or might not have caused the death of a young, strong, healthy, normal individual. Taking the testimony as a whole, the board is of the opinion that the accidental personal injury was the cause of his death."

And the board finds specifically:

"That on October 20, 1916, John Gaffney, deceased, suffered an accidental personal injury, arising out of and in the course of his employment, by being struck, shoved, or pushed by a machine and a board, causing him to fall upon and over a truck and to the floor of the mill in which he was working.

"(c) That, as a result of said accidental personal injury, he was disabled from and after October 20, 1916, until his death on December 29, 1916."

[1] We are concerned only to ascertain, it being asserted to the contrary, whether there is testimony supporting the finding and conclusion of the board. We are not all of us satisfied that we would reach the same conclusion, which, of course, is not the controlling thing. We shall not set out the testimony. Any analysis of it leaves some ultimate facts to depend upon inferences. But it remains that Mr. Gaffney, a man more than 65 years old, was in fact diseased, suffering from an advanced stage of arteriosclerosis. He had been able to work, but to quote from the medical testimony:

"A person with arteriosclerosis, as I discovered upon post mortem this

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man had had, would be more likely to be affected by a fall than if he was not suffering with that."

And again:

"A man suffering with arteriosclerosis, in the advanced stage which we found in this man, must have a weak heart. He is living, more or less, in the balance, and waiting for some cause to intervene to throw him in a state of acute illness; then any trivial influence, whether exposure or whatever else it might be, might give him broncho-pneumonia, or produce evidences of congestion of the kidneys, or any other acute disease which takes these people off."

[2] The testimony cannot be harmonized. We find ground for saying that the board had before it some evidence tending to prove that the fall which Mr. Gaffney had set up a train of physical disturbances, affecting an existing pathological condition in such way as to cause his death. We therefore decline to set aside the award.

[3] The board, at some length, enters into a discussion of the conduct of the employer, and concludes:

"(e) that the respondents, without any cause or reason, failed and neglected to report this accident to the Industrial Accident Board, in accordance with section 17, part 3, of the Workmen's Compensation Law, and subjected themselves to the imposition of the penalty of $50 mentioned in said section of the law."

The law provides that an employer who refuses or neglects to make the report "shall be punished by a fine of not more than fifty dollars for each offense."

Counsel for appellants directs our attention to this finding of the board, discusses the facts relating to it, and adds that "the imposition of a penalty upon defendants is wrong, and should be reversed."

We are concerned only with the order made by the board, which makes no reference to the matter. The board has not imposed a penalty or levied a fine. Upon this subject there is no order to be reversed or affirmed. We therefore do not regard the point as one for decision.

SUPREME COURT OF MICHIGAN.

GINSBERG

v.

BURROUGHS ADDING MACH. CO. (No. 16.)*

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—REVERSAL FOR HARMLESS ERROR.

Supreme Court should not reverse award of compensation by Industrial Accident Board for admission or hearsay evidence, if there is competent evidence to sustain the board's finding, but should affirm.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

* Decision rendered, Dec. 27, 1918. 170 N. W. Rep. 15.

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4. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—BURDEN OF PROOF.

Burden to establish claim under Compensation Act rests on those seeking award, who may prove their case by circumstantial evidence, as other cases are established.

(For other cases, see Master and Servant, Dec. Dig. §§ 403, 405[1].)

5. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—PROVINCE OF INDUSTRIAL ACCIDENT BOARD.

In a compensation case, the Industrial Accident Board is the trier of facts, and weighs conflicting testimony, medical as well as lay, having province to draw legitimate inferences from established facts, and to weigh probabilities from them, though inferences must be from established facts, and inference may not be built upon inference.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

6. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—ESTABLISHMENT OF CASE—INFERENCES FROM FACTS.

If inference favorable to applicant under Compensation Act can be arrived at by Industrial Accident Board only by conjecture or speculation, applicant may not recover, and also must fail if there are two or more inferences equally consistent with facts arising from established facts.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

7. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—AWARD—LACK OF SUPPORT IN EVIDENCE.

Where only witness, in widow's proceedings for compensation for husband's death, who saw accident, testified falling box only struck husband's toe, but death was caused by blood clot in intestines which originated in thigh, testimony of husband's statements being only evidence that falling box struck thigh, award could not stand.

(For other cases, see Master and Servant, Dec. Dig. 405[4].)

Moore, Bird, and Kuhn, JJ., dissenting.

Certiorari to Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) for death of her husband by Dina Ginsberg, opposed by the Burroughs Adding Machine Co., the employer. Compensation was awarded by the Industrial Accident Board, and to review the award the employer brings certiorari. Award vacated.

Plaintiff's husband, the decedent, was in the employ of the defendant on June 6, 1917. He and others were unloading boxes of steel from box cars. The boxes of steel were about 1½ feet square and from 6½ to 7 feet long. They weighed from 400 to 800 pounds. They were loaded in the ends of the car. The other workmen employed with decedent were named Trzienski and Schacht. The manner of conducting the work in hand was that Trzienski and Schacht with Iron hooks, similar to ice tongs, would take down the boxes from their places in the car; with the aid of a roller, consisting of a two-inch gas pipe, they would be conveyed to the door; there decedent would attach a similar hook which was connected with rope and pulley; he would put the hooks or tongs in the center of the boxes, and they would be lifted by the operation of the rope and pulley and slid out of the car. Schacht was not called as a witness, but Trzienski was. He testified that in the afternoon of the day in question he was trying to raise a box which he estimates would weigh about 600 pounds; decedent was ready to put the roller under it; that he was un-

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able to lift it high enough to get the roller under it; and it slipped and grated decedent's toe. He also says that he lifted the box off decedent's toe, and that the box did not hit decedent on his legs or body any place. There was testimony that thereafter decedent limped and was given other work to do. The straw boss learned of this accident, and at supper time decedent took off his shoe and stocking and the straw boss looked at his foot. There was little redness to the little toe and the one next to it, but no other evidence of an injury. Decedent worked overtime until half past 8. When he arrived home about 9 o'clock, he was limping. He washed and had his supper, but was unable to get up from the table and had to be assisted to bed. Upon his clothing being removed, it was found that the toes on his left foot were red, but they were not mashed; there was also a redness on his right leg, about four or five inches above the knee. He complained more about the leg than he did the toes.

Over the objection of the defendant, the plaintiff was permitted to introduce evidence of statements of decedent made at this time, and at later dates, as to how the accident happened, that a box of steel fell on his right leg. We shall have occasion to presently refer to this testimony and will not now further detail it. The testimony also shows that decedent had always before this been a strong, healthy man; had never been sick. He did not return to work. It does not appear that there was any serious trouble with the toes, but the condition of the leg grew serious, and the plaintiff called a doctor. Later a doctor employed by defendant also called on him. The doctor produced by plaintiff and the one produced by defendant do not disagree upon any material element of the case. From the medical testimony it appears that the condition of decedent's leg resulted in a thrombosis or stoppage of the saphenous vein in the thigh by a blood clot, necessitating the removal of a section of that vein on June 20th; that he suffered a relapse on June 27th, and died the following day; that death was due to the lodgment of a blood clot in the vessels of the intestines; that the blood clot undoubtedly came from the condition originally developed in the saphenous vein; that the condition of the toe had nothing to do with it; and that the condition of the saphenous vein might have been produced either by a blow or infection from bacteria in the system. The Industrial Accident Board found that deceased was struck in the right leg by the box of steel, receiving an accidental personal injury to his right thigh; that such injury was the proximate cause of his death; and affirmed the award of the committee of arbitration awarding plaintiff $8.27 per week for a period of 300 weeks. To review this award of the board, this writ was allowed.

Argued before Ostrander, C. J., and Bird, Moore, Steere, Brooks, Fellows, Stone, and Kuhn, JJ.

Standish Backus, of Detroit (William Strite McDowell, Stevenson, Carpenter, Butzel & Backus, and James A. Kirkpatrick, all of Detroit, of counsel), for appellant.

Louis James Rosenburg, of Detroit (Hollis Harshman, of Detroit, of counsel), for appellee.

FELLOWS, J. (after stating the facts as above). As the board has found that the deceased was injured as stated by him at various times after the accident, and as much of this hearsay testimony is quoted at length in the opinion, and as the board has expressly held that at least some of it was admissible, we will first consider the question of whether statements of the deceased as to how the accident happened, made after the happening of the event, are admissible.

In the case of Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771, we had the question of hearsay evidence before us, and it was there said:

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"The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common knowledge, and common conduct of mankind. Its principles are generally understood and acted upon in any important business transaction or serious affair in life. In such matters men refuse to rely on rumor of what some one has heard others say, and demand the information at first hand."

And we there approved the following language from Boyd on Workmen's Compensation, p. 1123:

"The statements made by an injured man as to his bodily or mental feelings are admissible, but those made as to the cause of his illness are not to be received in evidence. The rule applies to statements made by a deceased workman to a fellow workman as to the cause of his injury."

In addition to the authorities there cited, see Langeley v. Reeve, 3 B. W. C. C. 175; Amys v. Barton, 5 B. W. C. C. 117; Welsey v. Pethick Bros., 1 B. W. C. C. 411; Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540; Chicago & A. R. Co. v. Industrial Board of Illinois, 274 Ill. 336, 113 N. E. 629. In the last-cited case it was said:

"Declarations made by one injured to his attending physician are admissible in evidence when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury. (Citing authorities.) This rule is even more rigorously enforced as applied to lay witnesses."

[1] The statements made by deceased to his family as to the accident he suffered were made at a place some distance away, several hours thereafter, were but the narration of past events, and were not a part of the res gestæ. Merkle v. Township of Bennington, 58 Mich. 156, 24 N. W. 776, 55 Am. Rep. 666; Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 478; Jones v. Villiage of Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437.

[2] The board held that the statements of deceased made to Dr. McDonnell as to the happening of the accident were competent evidence and bound the defendant. They were put into the case, not for the purpose of showing notice of the injury, but as substantive evidence of the facts of the injury. It is argued in support of this holding that Dr. McDonnell was the agent of the defendant, made a report to the company, which however is not in the record, and therefore not before us; and that decedent's claim as to how the accident happened is evidence that it did so happen, and Reck v. Wittlesberger, supra, and Fitzgerald v. Losier Motor Co.,187 Mich. 660, 154 N. W. 67, are cited to support this holding. In the instant case, Dr. McDonnell was not a regularly retained physician of the defendant. He and other doctors were called to treat employees of defendant as occasion might arise; he was called upon to administer to employees, but not to represent the defendant in any way. It is apparent that the board has misconceived the holding of this court in these two cases. In the Reck Case, the employer reported to the board the cause and manner of the accident being that deceased was throwing wood in the furnace and a nail inflicted a gash in his hand. We there said:

"We think that such reports from the employer, where all sources of information are at his command when the reports are made, and he has had ample opportunity to satisfy himself of the facts, can properly be taken as an admission, and, at least, as prima facie evidence that such accident and injury occurred as reported."

It must be patent that the employer or the officer of a manufacturing company, who makes the report to the board, rarely, if ever, witnesses the accident. He obtains his information from others. It comes to him secondhand. If, after making his investigation, he concludes that the accident happened in a certain way and so reports, it may be regarded as an admission, and therefore some evidence before the board for its con-

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sideration. This was the situation in the Reck Case, and this was the holding.

In the Fitzgerald Case, the foreman, whose duty it was to report accidents to his superior, reported that deceased scratched his right hand on manifold on top of the thumb joint. He had received his information from the injured employee. But he was the authorized agent of the company to investigate and make such report; by adopting the claim of the employee as his own report and version of the accident, the employee's claim became and was his report. Following the Reck Case, it was held receivable as an admission and, together with other evidence, was held to be sufficient to support the finding.

These two cases hold that where the employer or his authorized agent, whose duty it is to make report of accidents, who have the opportunity to investigate, makes a report as to the accident, such report is receivable as an admission, and as an admission may be sufficient to establish a prima facie case. It is unimportant how the employer procures his information. It may all be hearsay. It may come through several hands, from different sources; but, when he or his authorized agent reports that the accident happened in a certain way, the report stating that it happened in that way is an admission and receivable as such. These cases go no farther. They do not make the claim of the injured employee as to how the accident happened evidence of the facts. It is only by the adoption of that claim by the employer or his authorized agent that it becomes an admission and receivable as such. In the instant case, we have no such report, nor was Dr. McDonnell the agent of defendant for the purpose of making such report. The board was in error in holding that such hearsay evidence was receivable as competent evidence of the facts.

[3-6] But we should not reverse the case for the admission of incompetent hearsay evidence. If there is competent evidence to sustain the finding, the case should be affirmed. Reck v. Whittlesberger, supra. In the consideration of these cases the rules which govern are well recognized. The burden of establishing a claim for compensation rests on those seeking the award. They are not required to establish their case by positive, direct evidence; in many cases that would be impossible; they may prove their case by circumstantial evidence as other cases are established. The board is the trier of the facts, and weighs and measures the conflicting testimony, medical as well as lay. Deem v. Paper Co., 189 Mich. 665, 155 N. W. 584; Perdew v. Nufer Cedar Co., 201 Mich. 520, 167 N. W. 868. It is the province of the board to draw the legitimate inferences from the established facts and to weigh the probabilities from such established facts. Wilson v. Phœnix Furniture Co., 201 Mich. 531, 167 N. W. 839. But the inferences drawn must be from established facts; inference may not be built upon inference, possibilities upon possibilities, or inferences drawn contrary to the established facts, contrary to the undisputed evidence. If an inference favorable to the appellant can only be arrived at by conjecture or speculation, the appellant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fail. McCoy v. Michigan Screw Co., 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323; Draper v. Regents of University, 195 Mich. 449, 161 N. W. 956; Albaugh-Dover Co. v. Indust Board, 278 Ill. 179, 115 N. E. 834; Curren v. Newark Gear Co., 37 N. J. L. J. 21; Savoy Hotel v. Indus. Board, 279 Ill. 329, 116 N. E. 834; Curran v. Newark Gear Co., 37 N. J. L. J. 21; Savoy Hotel Co. v. Indus. Board, 279 Ill. 329, 116 N. E. 712; Sanderson's Case, 224 Mass. 558, 113 N. E. 355; Carroll v. Knickerbocker Ice Co., supra; Burwash v. F. Leyland & Co., 5 B. W. C. C. 663.

[7] In the instant case, the only witness produced who saw the accident on June 6th testified that the only part of the body of deceased struck by the box was his toes. There is nothing inconsistent or im-

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probable about his testimony. It is in no way discredited save by the statements of the deceased, which were hearsay and improperly received in evidence. It is undisputed upon this record. No other witness testified in conflict with it, and the established facts are not inconsistent with it. Nor is the opinion evidence of the doctors inconsistent with it. As we have stated, they were not out of accord. Their testimony clearly puts the cause of death without the pale of inferences and within the sphere of speculation and conjecture. Short excerpts from the testimony of both demonstrate this. Dr. Allen, plaintiff's witness, in answer to questions propounded by her counsel, testified:

'Q. I wish to ask, Doctor, if this man had told you nothing, and you had seen him in the condition he was in the first time that you saw him, had saw him in the condition the second time that you saw him, and examined him and found he was otherwise normal, and knew only these facts, what would your opinion have been as to the cause of that condition? A. I would naturally have to state that it was possibly an infectious thing rather than a traumatic thrombosis.

"Q. Could you have determined one way or the other? A. No, absolutely no difference. It does not make any difference whether you get your inflammation from a blow to start with, or whether you get it from the infection; the pathological process is identical."

Dr. McDonnell, defendant's witness, testified:

"Q. Then what did cause the thrombus at that particular location? A. That is impossible to say. That is impossible for any doctor to state; it may have been so many different things."

We therefore conclude that the testimony of the statements of the deceased as to the happening of an accident to his thigh was hearsay; that it should not have been received or considered; that without it there is no evidence in the record in conflict with the testimony of the witness Trzienski; that there is no competent evidence to sustain the findings of the board; and that the award should be vacated.

Ostrander, C. J., and Stone, Brooke, and Steere, JJ., concurred with Fellows, J.

Moore, J. I think there was testimony upon which to base the finding of the Industrial Commission, and that the case should be affirmed.

Bird and Kuhn, JJ., concurred with Moore, J.

SUPREME COURT OF MICHIGAN.

HANNA

v.

MICHIGAN STEEL CASTINGS CO. ET AL. (No. 78.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION—CAUSE OF DEATH.

Where an employee was engaged at work in a carpenter shop where there was a circular saw, and was struck by a flying piece of board, the

*Decision rendered, Dec. 27, 1918. 170 N. W. Rep. 6.

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injury resulting in death, the master is liable under the Workmen's Compensation Act, although no one saw from what source the board came.

(For other cases, see Master and Servant, Dec. Dig. 405[4].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.

In a proceeding under the Workmen's Compensation Act to obtain compensation for death, evidence *held* sufficient to sustain a finding that an injury in the chest caused the pneumonia which resulted in the death.

(For other cases, see Master and Servant, Dec. Dig. 405[4].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AWARD.

The Supreme Court will not interfere with an award of the Industrial Accident Board, if there was competent testimony upon which to base the award, although improper evidence was admitted.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by Barbara Hanna, to obtain compensation for the death of her husband, Alexander Hanna, opposed by the Michigan Steel Castings Company, the employer, and the Michigan Workmen's Compensation Mutual Insurance Company. There was an award, and the employer and the Insurance Company bring certiorari. Affirmed.

Argued before Ostrander, C. J., and Bird, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Beaumont, Smith & Harris, of Detroit, for appellants.
Monaghan, Monaghan, O'Brien & Crowley, of Detroit, for appellee.

MOORE, J. Certiorari to the Industrial Accident Board to review its allowance of the plaintiff's claim as the widow of Alexander Hanna who was in the employ of the Michigan Steel Castings Company, and who was injured September 14, 1917, and who died on September 18th. It was the claim of the widow, and the Industrial Accident Board so found, that the death was the result of the injury.

In the brief of counsel for the appellant the discussion is under the following heads:

(1) There can be no recovery if Hanna was injured by a board flying from an unknown source.

(2) There can be no recovery if Hanna was injured by a board he was attempting to cut on the saw.

(A) Because as a matter of law the accident did not occur in the course of the employment of Alexander Hanna by the Michigan Steel Castings Company.

(B) Because as a matter of law, the accident did not arise out of the employment of Alexander Hanna by the Michigan Steel Castings Company.

(C) Because as a matter of law Alexander Hanna was injured by reason of his intentional and willful misconduct.

(D) Because the accident was not the proximate cause of the death of Alexander Hanna.

Each of these propositions is discussed at great length by counsel, and their conclusion is that this court should reverse the order of the Industrial Board, and hold that the defendants are not liable to plaintiff for the death of Alexander Hanna.

[1] 1. As to the first of these propositions there can be no possible

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doubt that Mr. Hanna was at work for the defendant company in some capacity—the company claims as a cleaner, which did not call upon him to use any buzz saw. His widow claims he was at work as a carpenter. It was while he was engaged at work for the company, and because of that employment, that he was injured; and, if as a result of the injury he died, it is difficult to escape the conclusion that liability followed.

2. We shall not attempt to follow the discussion of each subdivision under this head, but will attempt to state the claims of the respective parties, what is shown by the record, and our conclusions.

Mr. Hanna, at the time of the accident, had been employed by the defendant six months or more. He was 53 years of age. It is the claim of his widow that his work called upon him to push boards against a circular saw for the purpose of sawing them, and that one of them was thrown against him with great violence, hurting his hand and chest, and that as a result of his injuries his death followed.

It is the claim of the defendant that Mr. Hanna was employed as a cleaner, and that no part of his duty required him to use the buzz saw, and that if he did so that he was violating a positive order, and that he was guilty of intentional and willful misconduct. It is the further claim that the only injury Mr. Hanna received was to his hand, and that he died of pneumonia, to which the injury he received did not at all contribute, and that the court should say as a matter of law that the injury was not the proximate cause of his death. The claim that Mr. Hanna was guilty of intentional and willful misconduct is based upon the testimony of the foreman; we quote some of it:

"Q. State whether or not you had ever said anything to Mr. Hanna about operating or not operating any of the saws in your department.

"Mr. Crowley: I object to that testimony.

"Mr. Zierleyn: I think it is very proper, Mr. Crowley.

"Mr. Crowley: I desire that my objections stand as a matter of record.

"Mr. Zierleyn: Answer the question.

"A. I took him off the carpenter work because I did not think his eye sight was good enough for it—he had to put glasses on for it—and I told him if he would not keep off the saw I would have to fire him, and not only told him that, but I told his son too."

[2] Mr. Hanna knew what conversation he had with the foreman upon that subject. He is not here to give his version. Such a contingency has been guarded against in section 12553, C. L. 1915. The language of the statute is not ambiguous, as a reference to it will show. It has often been construed by this court, as is shown by the many cases cited in the notes to section 12553. See, also, the case of Horn v. Arnett (N. J. Supp.) 102 Atl. 366.

The testimony of the foreman should not have been received. With it eliminated, there is nothing to indicate that Mr. Hanna was warned not to use the saw.

It is said that the case represented by the plaintiff, when the improper evidence is eliminated, must be determined as a question of law in favor of the defendant. This makes it necessary to give a resume of the testimony most favorable to the plaintiff. After the accident the company made a first report to the Accident Board, in which it was said:

"Occupation of employee carpenter. Date of accident September 14, 1917. Nature and cause of injury, bruised left hand."

A second report was made September 19th in which the following appears:

"Place of accident in detail, carpenter shop. Cause and manner of accident was cutting wood for wedges. In taking pieces from the saw one piece caught and struck him on the joint of the first finger of left hand. This finger was off at joint. It jammed stump of finger and bruised it."

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Against the objection of defendant Mr. Hanna's doctor was allowed to testify:

"Why he said that he had received it at a machine sawing wood. A piece of wood flew from the machine and struck him across the chest."

In his testimony appears the following:

"Q. Do you at this time lay any stress upon the injury to the hand, or the injury to the chest, or both? A. Yes; I do on the injury to the chest. The hand was simply an abrasion of the hand that was septic, but I do not believe it had—did not have any factor towards causing his death.

"Q. It was the alleged injury to the chest which was the factor that finally resulted in his death, in your opinion? A. Resulted in pneumonia; yes.

"Q. In other words, the injury to the chest was the thing that caused the pneumonia in your opinion A. Yes. * * *

"Q. The question is this—perhaps it would be more simple to say it in this way: In your opinion, the cause of pneumonia was the blow on the chest? A. Yes, sir. * * *

"Q. And the pneumonia caused the death? A. Yes, sir. The man was at that time delirious, and he was carrying a tremendously high temperature and rapid pulse, and I thought there was a septic condition going on at that time. The man at the first time I seen him, I would not have taken anything he said to me anyway, because he was not in his right mind; he was delirious. So the next time I seen him I went into the matter closer, and I found the hand was not the entire cause of the pneumonia, but the chest had been injured.

"Q. Would the infection in any way superinduce the pneumonia? A. I do not think in this case.

"Q. Could it contribute to the cause of death? A. Yes; perhaps by having an embolus leave the wound in the hand and cause an infarct in the hand—that would probably cause pneumonia—but the post mortem showed that the pneumonia was of too large an area for embolic pneumonia.

"Mr. Crowley: So that, in your judgment, Doctor—I understand you now that the blow on the chest caused this traumatic condition? A. Yes; I made the diagnosis of traumatic pneumonia, caused by the concussion of the board striking the chest."

A witness, who was at work about 50 feet away from Mr. Hanna, testified the latter was cutting a piece of wood on the saw.

"Q. What kind of a piece of wood did he have at the saw? A. It was a piece of pine about 18 inches long.

"Q. How wide or how thick was it? A. Well, when I seen it it was in two pieces. I only seen one piece of it, and it was about 5 inches wide.

"Q. About 5 inches wide. You don't know what he was going to saw that for, do you? A. No.

"Q. What was the first notice—what was the first you noticed with respect to this accident? A. I looked up, and I seen him holding his hand to his side.

"Q. Was he holding his hand to his right side? A. Yes. * * *

"Q. Now, did you see this piece of wood that he was working with after that? A. Yes, sir.

"Q. Did you notice anything peculiar about the wood? A. It was broken; that is all.

"Q. Did you notice any links of a chain in the wood? A. Yes.

"Q. What kind of chain was that? A. I think it was a kind of four-cornered piece.

"Q. What kind of chain was it, a watch chain? A. A watch chain, yes. * * *

"Q. Where was the rest of the chain? A. In his pocket.

"Q. Which pocket? A. Why, I think it was the vest pocket

"Q. Vest? A. The vest pocket. * * *

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"Q. What caused you to look up and notice what was happening at that saw. A. When I heard that piece fly over the saw.

"Q. When you heard the piece of wood fly over the saw? A. Yes.

"Q. Did it strike the saw? A. Yes; it struck the saw.

"Q. How do you know it struck the saw? A. Why, it would not have went back otherwise.

"Q. I assume then that it made a noise? A. Yes.

"Q. And you heard that and glanced up? A. Yes.

"Q. When you first glanced up, what was Mr. Hanna doing? A. He was holding his two hands on his left side.

"Q. On his left side? A. Yes."

The piece of wood after it struck Mr. Hanna flew 10 or 12 feet down an open stairway and hit Mr. Thomas, who was coming up the stairs, knocking him down. The record shows that part of the duties of a carpenter are to make molding flasks, and in doing so that the carpenter would use a circular saw in preparing some of the pieces.

Mrs. Hanna testified as to what happened on the evening of the accident, in part as follows:

"A Well, the usual time he got home about a quarter to 6 to the best of my knowledge.

"Q. What condition was he in when he arrived home? Well, his hand was terribly swollen and very much inflamed, and he said he was very weary and complained terribly of his breast.

"Q. Did you examine his hand? A. Yes, sir; I was ordered by first aid to bathe it in hot water. I told him my best judgment called for cold water, but he said no; he was told at the hospital, hot water.

Q. Did you make an examination of his brest? A. Yes, sir; I did.

"Q. What did you notice particularly about his chest? A. There was a very red place on his chest.

"Q. Where was that? On his chest, as near as I can tell you, over his lungs."

It is urged that what Mr. Hanna told the doctor about how he was hurt was improperly admitted. We think this was so under the case of Ginsberg v. Burroughs Adding Mach. Co., 170 N. W. 15.

[3, 4] But with this testimony omitted we think it cannot be said there was no testimony upon which to base the award of the Industrial Accident Board and their finding that the injuries to Mr. Hanna were the proximate cause of his death. Under such circumstances this court will not interfere. See Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; Papinaw v. Railway Co., 189 Mich. 441, 155 N. W. 545; Vogeley v. Detroit Lumber Co., 196 Mich. 516, 162 N. W. 975.

The award is affirmed, with costs to the plaintiff.

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SUPREME COURT OF MICHIGAN.

NELSON

v.

IRONWOOD & B. RY. & LIGHT CO. (No. 47.)*

1. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—"COMMON CARRIER BY RAILROAD."

A street railway engaged in carrying passengers between states is a "common carrier by railroad" within the meaning of the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665).

(For other cases, see Master and Servant, Dec. Dig. § 87.)

(For other definitions, see Words and Phrases, First and Second Series, Common Carrier.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.

Where a master had not elected to come under the Workmen's Compensation Act, an agreement for payment of compensation was not binding upon the servant.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Error to Circuit Court, Gogebic County; S. S. Cooper, Judge.

Action by Victor O. Nelson against the Ironwood & Bessemer Railway & Light Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Argued before Ostrander, C. J., and Bird, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Charles M. Humphrey, of Ironwood (Sanborn, Lamoreux & Pray, of Ashland, Wis., of counsel), for appellant.

James A. O'Neill, of Ironwood (S. G. Nelson, of Ironwood, of counsel), for appellee.

KUHN, J. The defendant is a corporation admitted to do business in both Michigan and Wisconsin, and at the time of the accident which gives rise to this litigation was operating a street railway and interurban system, the entire system extending from the city of Bessemer, as its eastern terminus, in the state of Michigan, to the village of Gile, Wis., as its western terminus. Its tracks were laid along the main streets of the city of Ironwood, Mich., and the village of Hurley, in the state of Wisconsin. It operated interurban cars from the city of Bessemer to a point in the city of Ironwood, a short distance east of the state line. It also operated cars, designated as local cars, from Jessieville, a suburb within the city limits of Ironwood, through the city of Ironwood, through Hurley, Wis., to Gile.

The plaintiff, at the time of the accident, was employed as a motorman on one of the city or local cars. His employment was limited to the city of Ironwood, and he commenced his run at a point in that city, took his car on a trip eastward through the city to the eastern terminal of the line at Jessieville, and returned to the point at which he took charge, being at all times in the city of Ironwood. When he completed his run through the city or Ironwood, the car was turned over

* Decision rendered, Dec. 27, 1918. 170 N. W. Rep. 45.

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an another crew, the conductor on the plaintiff's run becoming the motorman, and the car was then taken on a trip across the line into Hurley, Wis., and return.

On the night of the accident, at about 8:30 in the evening, the plaintiff had taken his car on the trip through Ironwood to the eastern terminal of the line and was returning without any passengers. As the car turned the corner of Ayer and Marquette streets in the city of Ironwood, the trolley pole came off the trolley wire, and, as was his duty, he went to the rear of the car with reference to it. In replacing the trolley pole, it was necessary for him to stand between the rails of the track in the rear of his car and manipulate a rope that was attached to the trolley pole. As he was in the act of replacing the trolley pole, an interurban car approached rapidly from the rear and collided with his car, which resulted in the plaintiff being caught between the cars and severely injured, and as a result he lost his left leg at the thigh.

At the time of the accident the defendant railway company had not elected to come under the state Workmen's Compensation Law (Pub. Acts [Ex. Sess.] 1912, No. 10), and this action was brought to recover damages, as a common-law action, resulting in a verdict for the plaintiff in the sum of $12,500.

At the time the plaintiff was injured, he was 21 years of age, and had resided in the United States a little over 2 years, having emigrated from Sweden, and it is claimed that he was unable to speak or read the English language and could understand but little of it. The defendant, on the trial, pleaded settlement and release, and there was offered and received in evidence on the trial, over the objection of plaintiff's counsel, an instrument purporting to be an agreement in regard to compensation, signed by the plaintiff and bearing date of November 1, 1916, seven days after the accident. This agreement was made out on the usual blank form used by the Industrial Accident Board. The defendant at the time of the accident was not subject to the provisions of the Workmen's Compensation Act, and did not elect to come under that act for several months thereafter. This paper was signed by plaintiff while he was confined in the hospital, and about a month later he received a check for a little over $8, and thereafter he was paid about $16 every two weeks until the following March, a period of about three months. After he had consulted his counsel, he was advised to no longer accept payments and did not accept any money thereafter.

The questions which are raised by defendant's counsel are discussed in their brief and were discussed on the argument under three heads, as follows:

"(1) That the parties to this action, at the time of the accident, were subject to the rule of liability established by the federal Employers' Liability Act, and that the case was improperly submitted to the jury upon the theory that the defenses were taken away.

"(2) That the settlement agreement having been entered into in good faith, and the plaintiff having received payment on that settlement after discovering that the defendant was not under the Michigan Workmen's Law, ratified and confirmed the settlement agreement.

"(3) That the plaintiff could not maintain his action without returning or offering to return to the defendant the money received by him and the money paid for him under this settlement agreement."

1. Is the defendant a "common carrier by railroad" within the meaning of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665)? In the determination of this question, and in attempting to ascertain what the legislative intent of Congress was in passing the act in question, we will necessarily be governed by the federal decisions. Whether or not it was within the legislative contemplation that the word "railroad" was to include a street railroad must be determined by construing the statute as a whole. Plain-

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tiff's counsel strongly urge that it was not the intention of Congress by this act to legislate with reference to the employees of purely local street railways which might be engaged in interstate commerce, and cite in support of their contention the case of Omaha, etc., St. Ry. Co. v. Interstate Commerce Commission, 230 U. S. 324, 33 Sup. Ct. 890, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, where the court construed the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379), and the question was whether street railways became subject to its provisions and under the jurisdiction of the Interstate Commerce Commission. Mr. Justice Lamar, in writing the opinion for the court in that case, showed the distinction between ordinary street railways and commercial railroads, and reviewed the act, and concluded, from its entire context and from provisions therein contained which were peculiarly applicable to commercial railroads, and not to street railways operating only on the streets of cities and villages, that it was not the intent of Congress to include purely street railways within the provisions of that act. An examination of the federal Employers' Liability Act, however, does not, in our opinion, call for the drawing of any such distinction, and, as was said by Mr. Justice Clarke in reference to the Omaha Case, supra, in the more recent case of Washington Ry. & Elec. Co. v. Scala, 244 U. S. 630, 37 Sup. Ct. 654, 61 L. Ed. 1360:

"The case is of negligible value in determining either the construction of the act we are considering in this case (Employers' Liability Act), or the classification of the defendant, which clearly enough is a suburban railroad common carrier of passengers within the scope of the federal Employers' Liability Act, as is sufficiently decided by United States v. Baltimore & Ohio Southwestern Ry. Co., 226 U. S. 14 [33 Sup. Ct. 5, 57 L. Ed. 104]; Kansas City Western Ry. Co. v. McAdow, 240 U. S. 51 [36 Sup. Ct. 252, 60 L. Ed. 520]; Spokane & Inland Empire R. R. Co. v. United States, 241 U. S. 344 [36 Sup. Ct. 668, 60 L. Ed. 1037]; and Spokane & Inland Empire R. R. Co. v. Campbell, 241 U. S. 497 [36 Sup. Ct. 683, 60 L. Ed. 1125]."

It seems to us clear that the purpose and intent of the federal Employers' Liability Act was to establish throughout the United States a uniform rule of broad liability on the part of common carriers by railroad to their employees for negligent personal injuries, in so far as, and to the full extent to which the regulative power of Congress extends, in order that the legal status of such employers' liability for negligent injuries inflicted upon an employee while both employer and employee are engaged in interstate commerce, instead of being subject to the uncertainty of varying rules depending upon the particular locality in which the accident may chance to occur, may be fixed by a single rule, and by such a rule, moreover, as will tend to impel such carriers to avoid or prevent the negligent acts and omissions for which the statute gives the right of recovery, thereby promoting not only the safety of the employees, but also, as a necessary consequence, the safer and less impeded transportation of the objects of commerce, whether freight or passenger. If any distinction whatever can be drawn between street railways and other railroads in any respect that can fairly be claimed to have a possible bearing on the question of the legislative intent of Congress as to the inclusion or exclusion of the former class of carriers, the difference, we are convinced, will be found to be merely one of degree and not of kind. No substantial reason suggests itself to us why the safe and unimpeded transportation of passengers from one state into another on a local street railway line operating solely over city streets, and the safety of the employees of such a railway, should not have been objects of solicitude on the part of Congress as well as the like beneficial results in connection with other forms of interstate railroad transportation. Nothing in the terms and provisions of the act indicates a design to exclude street railways. Every provision of the act is as applicable to a purely street

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railway carrier whose lines extend from one state into another as to an interstate suburban electric railroad or an interstate steam railroad.

In the case of Arends v. Rapid Ry. Co., 172 Mich. 448, 138 N. W. 195, this court had under consideration an act of our Legislature (Pub. Acts 1909, No. 104) the title of which was "An act to prescribe the liability of common carrier railroad companies to their employees," and the express language of section 1 of the act made it applicable to "every common carrier railroad company in this state." It was determined in that case that the term "railroad" was broad enough to include street railways.

[1] In our opinion, it must be said that it was the intent of Congress by the act in question to include street railways that were engaged in interstate commerce, and therefore, if it can be said that the plaintiff was engaged in interstate commerce at the time of the accident, his action should have been brought under the federal act. See South Covington & C. St. Ry. Co. v. Finan's Adm'x, 153 Ky. 340, 155 S. W. 742; Kiser v. Metropolitan St. Ry. Co., 188 Mo. App. 169, 175 S. W. 98.

[2] It is the contention of plaintiff that, even if it should be held that the defendant, in the operation of its street railway, was under the federal act, plaintiff was not at the time of the accident engaged in interstate commerce, and was not, therefore, subject to the provisions of that act. With this contention we cannot agree. In the instant case the street car upon which the plaintiff was employed was an instrumentality clearly engaged in interstate commerce, and the case comes within the test laid down in Shanks v. D., L. & W. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, where it stated that the question is:

"Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

The car upon which the plaintiff was employed went from one state into the other, and, the plaintiff being employed thereon, the case is clearly within the test above set forth, and it must therefore be said that he was engaged in interstate commerce. See, also, North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Spokane, etc., R. Co. v. Campbell, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125; Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. Ed. 1181; South Covington & C. St. Ry. Co. v. Covington, 235 U. S. 537, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792; Moliter v. Wabash R. Co., 180 Mo. App. 84, 168 S. W. 250.

[3] It is next contended by counsel for plaintiff that, while under the state law the defenses of negligence of fellow servant, contributory negligence, and assumption of risk were not open to defendant, nevertheless there was no prejudicial error committed in submitting the case on the theory that the case was not subject to the federal act, because, under the facts in this case, the defendant was not deprived of making any defense that it could have made under the federal act, and it is therefore contended that, even if it should be held that the plaintiff was subject to the federal act, the judgment should be affirmed. With this contention we cannot agree, because, under the federal act, the question of plaintiff's contributory negligence might properly be submitted to the jury as affecting the question of damages, and we are impressed that under the facts of this case the question was one of fact, and would necessarily be submitted to the jury.

[4] 2. With reference to the agreement in regard to compensation, which it is claimed the plaintiff signed following the accident, we are of the opinion that it should not be held as a bar to this action. In accepting these compensation checks, plaintiff testified that he did not know, and was not told, what they were for, and that he assumed that they were probably club money, as he had worked on a railroad in the old country where a fund was provided by the employees for such contingencies. At the time that the so-called release agreement was signed, the defendant had not

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elected to come under the Workmen's Compensation Act, and the agreement, therefore, was not binding upon the plaintiff at the time it was executed. See Bernard v. Mich U. Trac. Co., 188 Mich. 504, 154 N. W. 565. The court, at the request of the defendant, charged the jury that if they found that the agreement in regard to compensation was a mutual agreement, and the parties understood each other, or if the plaintiff afterwards ratified the agreement by his action and intent to release the defendant, the plaintiff would be bound by it, and it would be an absolute release. This was as favorable an instruction as the defendant was entitled to. Plaintiff's testimony tended to show that his signature to the instrument was obtained by false and fraudulent representations, and even if it purported to be a release or could be construed to be a release if entered into fairly and understandingly, in our opinion the jury was warranted, under the testimony and the charge of the court, in finding that it was not binding upon the plaintiff.

[5] 3. Neither are we of the opinion that, because of the claim that it was not understood by the plaintiff that the amounts received were in settlement of the disputed liability, it follows as a matter of law that a return of the money was necessary. The question was in dispute, and should be submitted to the jury. See Brown v. Ann Arbor R. Co., 183 Mich. 574, 149 N. W. 1031.

Under the declaration filed in this cause, the court should have granted the motion made by the defendant that the plaintiff had not made out a case, as he had elected to stand on his common-law action; it appearing that the parties to the action were both subject to the federal Employers' Liability Act.

For these reasons, the judgment must be reversed, and a new trial granted.

SUPREME COURT OF MICHIGAN.

SCHANNING

v.

STANDARD CASTINGS CO. ET AL. (No. 88.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PROVISIONS OF INDUSTRIAL ACCIDENT BOARD.

It is the province of the industrial accident board to weigh evidence and draw inferences therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

In proceedings under Workmen's Compensation Act, evidence *held* to sustain finding of industrial accident board that employee working with truck was injured by unexpected dropping of truck into hole, and that resultant jerk and unusual strain upon employee caused a rupture.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

* Decision rendered. Dec. 27, 1918. 169 N. W. Rep. 879.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"ACCIDENTAL INJURY."

A rupture caused by jerk and strain upon employee working with truck upon the unexpected dropping of truck into a hole *held* an "accidental injury," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, Second Series, Accidental Injury.)

Certiorari from the Industrial Accident Board.

Proceedings under the Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10), by Carl Schanning to obtain compensation for personal injuries, opposed by the Standard Castings Company, employer, and the General Accident Fire & Life Assurance Corporation, Ltd., insurer. Award made by industrial Board, and employer and insurer bring certiorari. Affirmed.

Argued before Ostrander, C. J., and Bird, Moore, Steere, Fellows, Stone, and Kuhn, JJ.

Thomas A. Lawler and John F. Berry both of Lansing, for appellants.

OSTRANDER, C. J. The award was $10 a week for 9½ weeks and hospital and medical expenses incurred in the first 3 weeks. Plaintiffs in certiorari say there was no competent evidence before the industrial accident board from which it could find that an accident which arose out of and in the course of claimant's employment happened; that there is no competent evidence that claimant received an injury from the alleged accident or that his alleged disability resulted therefrom.

Claimant says that he was injured October 31, 1917. His employer, on November 1, 1917, reported to the board that claimant was involved in an accident, the nature of his injury being a rupture, "lifting castings." A second report was made by the employer November 14, 1917, in which it is stated that—

"The cause and manner of accident was trucking castings from foundry to rattler room (castings slipping from truck, tried to hold same on, causing a rupture)."

The board found:

"That the unexpected dropping of a truck into a hole with the resultant jerk and unusual strain upon applicant, causing the rupture, constituted an unexpected, unusual, and undesigned occurrence, also an unlooked for mishap, and an accident within the meaning of the Workmen's Compensation Act."

Claimant gave testimony through an interpreter. The interpreter's statements were:

"He says he was handling iron, called 'bulldog,' him and another fellow, and the iron was weighing between 500 and 600 pounds. They placed it on a truck, and, as the other fellow jerked the truck, he hurt his back. * * * After that, he could not work, and he went immediately to consult a physician. * * * He says the other fellow was pulling, and he was pushing, and that the truck fell into a hole, and that is what gave him the jerk."

Giving the name of the physician he consulted, and asked what was done for him, he proceeded:

"He says he took him to the drug store and bought him a belt, and after that he was going to him and taking treatments."

Inquired of about the position of the belt on his body, he said:

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"He put it across his back and the side of his limb. He says he still has it on now."

Claimant returned to work January 5, 1918, and of the interim he testified:

"He says the doctor told him not to go to work any sooner, and he got kind of disgusted because he thought the belt wasn't good, and he said he didn't want to give him another belt, and he says: 'If you want to go to work, you can go to work.'"

The physician was not examined, it being stated that he was in the army. Further testimony was given by claimant to the effect that he first felt pain in his back, then in his privates, that he was advised by the doctor to have an operation performed, and refused to do so. When he was hurt, he reported to his foreman, telling him he could not work and that he had hurt his back. Claimant made a statement December 5,1917, which was written down by the one to whom it was made, in English, and was read to claimant by a German acquaintance in German; the friend undertaking to translate the English into German. This statement is to the effect that, while picking up a casting from the floor to place it on the wheelbarrow, he felt a pain in his back and stopped work and went home.

"When I stooped to pick this casting up, a sharp pain caught me in the back, and I couldn't straighten up. After I got straightened up, I went to the office to report, and then went to the doctor's office."

Claimant was examined with reference to this alleged statement and denied having given it as it reads. The man with whom claimant was working was a witness. He gave testimony corroborating that given by claimant except that it is his recollection that he was pushing the truck and claimant was pulling it. He testified that the truck dropped in a little hole "and raised him up like that." Upon being recalled, claimant testified, as the record is understood, that he was pulling "and the other fellow was pushing."

[1-3] It is the province of the board to weigh evidence and draw inferences therefrom. We cannot say there was no evidence to support the finding. If, in pushing or pulling the truck by its handles, one or more of its wheels dropped into a hole, jerking claimant in such a manner as to cause a rupture, it was an "accidental injury." Robbins v. Original Gas Engine Co., 191 Mich. 122, 157 N. W. 437.

The award is affirmed.

SUPREME COURT OF MICHIGAN.

SMITH

v.

BATTJES FUEL & BUILDING MATERIAL CO. ET AL. (No. 54.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SURGICAL OPERATION.

Where injured servant's condition of total disability was entirely due to his original injury, State Accident Fund was not entitled to be relieved from weekly payment it had agreed to make during disability, on ground that present disability was caused by unskillful treatment or refusal to submit to operation.

(For other cases, see Master and Servant, Dec. Dig. § 385[18].)

* Decision rendered, Dec. 27, 1918. 169 N. W. Rep. 943.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF INDUSTRIAL ACCIDENT BOARD.

Supreme Court does not concern itself with determination of questions of fact when there is any competent testimony supporting the conclusions reached by the Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDS OF MALPRACTICE SUIT—CREDIT TO STATE ACCIDENT FUND.

Where State Accident Fund agreed to pay weekly compensation to injured servant, who thereafter recovered from his physician for malpractice, on petition of Accident Fund for right to cease payments, it is not entitled to credit for sum received by servant from physician in settlement of malpractice suit in reduction of amount due from fund to claimant under Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

Certiorari to Industrial Accident Board.

Proceeding for compensation for injuries under the Workmen's Compensation Act by Elmer L. Smith, opposed by the Battjes Fuel & Building Material Company, the employer, and the State Accident Fund, the insurer. After an agreement for compensation, the employer and the insurer petitioned the Industrial Accident Board for right to cease further payments; and to review an order of the Board denying the petitions, the employer and insurer bring certiorari. Affirmed.

In April, 1915, claimant, while in the employ of respondent Battjes Fuel & Building Material Company, received an accidental injury in which his right arm was broken in at least two places, accompanied by a partial dislocation of the elbow joint. The injury was attended by one Dr. Wedgewood, who was called by the superintendent of the respondent Company. On May 28, 1915, a written agreement was entered into between the claimant and the commissioner of insurance (the risk being carried by the State Accident Fund), by the terms of which claimant was to receive $6.49 per week during disability. The State Accident Fund paid under this agreement for 124 weeks, or up to about September 1, 1917, when further payments were discontinued, for the reason that claimant refused to submit to an operation. In the meantime, and on January 29, 1916, claimant becoming convinced that the then condition of his arm, which was entirely useless, was due to malpractice on the part of the attending physician, Dr. Wedgewood, brought suit against said Wedgewood in the circuit court for Kent county. On March 27, 1916, this suit was settled by Dr. Wedgewood, the consideration for said settlement being the sum of $2,125, paid by him to claimant. Two petitions were filed with the Industrial Accident Board by respondents, praying for the right to cease making further payments—the first on September 11, 1917, upon the ground that claimant refused to submit to a surgical operation, which it was alleged would cure and improve the condition of his arm; the second on the 1st of December, 1917, upon the same ground, with the added grounds that claimant had received a second injury in the month of August, 1917, and that he had received the sum of $2,125 from the doctors was taken by the board upon the hearing of these petitions, and which he claims compensation. The testimony of some eight or nine doctors was taken by the board upon the hearing of these petitions, and an order was entered by the board, denying both of them, the board finding:

(1) That the present condition of claimant, which is one of total disability, is due to the original accident, and not to any malpractice.

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(2) That claimant's refusal to submit to proposed surgical operations upon his arm, under the testimony in the case, is not unreasonable.

(3) That his receipt of the money from Dr. Wedgewood did not constitute an election, within the meaning of section 15, part 3, or of section 1, part 4, of the Workmen's Compensation Act (Acts 1912 [Ex. Sess.] No. 10).

(4) That the allegations in his declaration filed against Dr. Wedgewood are not binding and conclusive upon claimant, but may be considered as evidence only.

Respondents review the question in this court and contend for the following propositions:

"(1) That by starting the malpractice suit claimant elected to hold Dr. Wedgewood for all damages accruing after the time his arm, under normal conditions, would have healed, and by such election released the State Accident Fund from all payments thereafter, or at least from all payments accruing after the settlement of said suit.

"(2) That if the State Accident Fund is not, on account of the malpractice suit, released from further payments, it is nevertheless entitled to have the amount received by claimant from Dr. Wedgewood applied pro tanto to the total compensation which the State Accident Fund may have to pay."

Argued before Ostrander, C. J., and Bird, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Thomas, Shields & Silsbee, of Lansing, for appellants.
Wykes & Averill, of Grand Rapids, for appellee.

BROOKE, J. (after stating the facts as above). It is conceded by counsel for appellants that:

"Dr. Wedgewood's liability grew out of conditions which section 15, part 3, does not cover. It is our contention, however, that the doctrine of election as followed generally is applicable to this case and that section 15 of part 3 may be useful as showing the general policy of the law as intended to be applied to workmen's compensation cases."

In this connection it is urged that in the suit against Dr. Wedgewood claimant took the position that his present condition of total disability is due solely to the alleged malpractice of Dr. Wedgewood; that he fraudulently abstained from communicating the fact that he had received upwards of $2,000 from Dr. Wedgewood to the officers of the State Accident Fund, and continued to receive from that fund his weekly payment of $6.49; that the position assumed by claimant at this time is of necessity inconsistent with the one taken by him in his suit against Dr. Wedgewood; and that, having elected to look to Dr. Wedgewood, he should therefore now be held to have abandoned any other source of compensation. In this connection it is said:

"When claimant received $2,125 in payment for his injuries, did he not by that act receive full and complete compensation for the then condition of his arm? If he did, he most surely could not expect compensation from the State Accident Fund, as he had been fully compensated by:

"(a) The State Accident Fund for the original injury and by

"(b) Dr. Wedgewood for the injury caused by the malpractice.

"If this view is correct, then there should be no further compensation paid. In fact, the State Accident Fund should have an action back against Smith for that portion of the compensation which they have paid him since the institution of the suit for malpractice."

In support of the position taken, counsel cite the case of Ruth v. Witherspoon-Englar Co., 98 Kan. 179, 157 Pac. 403, L. R. A. 1916E, 1201, the headnote of which follows:

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"In an acton under the Workmen's Compensation Act a recovery can be had only upon the basis of disability to labor resulting from the injury received in the course of employment, wthout the intervention of an independent cause, the separate consequences of which admit of definite ascertainment. It cannot be augmented by the fact that the disabling effects of the injury are increased or prolonged by incompetent or negligent surgical treatment, even where the employer is responsible therefor."

See also, Della Rocca v. Stanley Jones & Co. (Ct. of Appeal England, Jan. 21, 1914) W. C. & Ins. Rep. 34, annotated in 6 N. C. C. A. 624, and Humber Towing Co., Ltd., v. Barclay, 5 Butterworth's W. C. C. 142 (1911).

[1, 2] The difficulty in applying the principle announced in the cases cited to the case at bar lies in the fact that here upon the hearing on the petition, there was testimony of physicians to the effect that claimant's present condition of total disability—

"was entirely due to the original injury in 1915 and that such injury was the proximate cause of his present condition."

Another physician testified:

"I would consider Mr. Smith totally disabled, and that this condition of total disability is due in large part to the original injury in April, 1917 (1915?). Approximately the original injury was the cause of his resulting present physical condition. I would state that even if this doctor, who treated this arm in the summer of 1915, had done the best that could ordinarily be done by a careful, skilled, prudent physician this arm would still, or might reasonably still, at the present time, be in a condition resulting in total disability."

There was other medical testimony before the board from which, if believed by the board, it would appear that by submitting to an operation or operations the condition of plaintiff's arm would be greatly improved, and that thereby he might regain from 25 to 50 per cent of its normal use. This court, however, does not concern itself with the determination of questions of fact, when there is any competent testimony supporting the conclusions reached by the board. In the light of the statements of the physicians quoted above, it can hardly be said that there was no testimony in the case warranting the board in concluding that the claimant's present condition of total disability is due to the original accident.

[3] Not complicated, therefore, with claimant's action against Dr. Wedgewood, the order of the board denying the petition should be affirmed. Does the fact that claimant started suit against Dr. Wedgewood by declaration in which he averred that his condition of total disability was the result of malpractice, and not an original accident, estop him from now asserting that such condition is due to the original injury? We are of opinion that the board was correct in holding that the averments of the declaration were not conclusive as admissions against the claimant, but might be considered by the board as evidence in connection with all the other evidence in the case. Ruth v. Witherspoon-Englar Co., supra.

[4] The only question remaining is whether respondent State Accident Fund should have credit for the $2,125 received by the claimant from Dr. Wedgewood in reduction of the amount due from it to claimant under the terms of the statute. Our law makes no provision for the application of sums received by a claimant from a third party, not connected with the original accident, in reduction of the master's liability under the act. If such an application should be made, it is a matter of legislative action. rather than judicial interpretation.

The order of the board stands affirmed.

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SUPREME COURT OF MINNESOTA.

STATE EX REL. LONDON & LANCASHIRE INDEMNITY CO. OF AMERICA

v.

DISTRICT COURT OF HENNEPIN COUNTY ET AL. (No. 21156.)*

1. MASTER AND SERVANT — INTOXICATION — WORKMEN'S COMPENSATION ACT—EVIDENCE.

The evidence sustains the finding of the trial court that an accident resulting in death was not caused by the intoxication of the decedent and that an award was not prevented by the provision of the Workmen's Compensation Act contained in Gen. St. 1913, § 8203.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—ACCIDENT ARISING IN COURSE OF EMPLOYMENT —EVIDENCE.

The evidence sustains a finding that an accident resulting in the death of the decedent, a traveling man, who was driving an auto furnished by his employer and was on his way to his home, which was the point from which he worked, arose in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari from District Court. Hennepin County; William E. Hale, Judge.

Certiorari by the State, on the relation of the London & Lancashire Indemnity Company of America, against the District Court of Hennepin County and others to review a judgment of that court, awarding compensation, under the Workmen's Compensation Act, for the death of Thomas H. Chambers. Affirmed.

John F. Bernhagen, of Minneapolis, for relator.

McNamara & Walters, of St. Paul, and H. V. Mercer & Co., of Minneapolis, for respondents.

DIBELL, J. Certiorari to the district court of Hennepin to review its judgment awarding compensation under the Workmen's Compensation Act for the death of Thomas H. Chambers. The judgment gave compensation against the relator insurance company and the employer and fixed the obligations between themselves of the the insurance company and the employer.

Chambers was in the employ of C. C. Wyman & Co. of Minneapolis as a traveling solicitor in the grain business. He was killed in North Dakota on May 5, 1917, by the overturning of an auto furnished him by the company and which he was driving. One phase of the case was considered in State v. District Court, 139 Minn. 205, 166 N. W. 185.

The Wyman Company carried indemnity insurance in the relator. The relator claims that there can be no recovery under the compensation act because the intoxication of Chambers was the cause of the accident, and further because the accident did not arise in the course of his employment. It also claims that its policy did not promise indemnity to

* Decision rendered, Jan. 3, 1919. 170 N. W. Rep. 218. Syllabus by the Court.

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the Wyman Company for accidents to its employees' without the state and therefore it is not liable. These are the issues.

[1] 1. The relator claims that Chambers was intoxicated and is precluded from recovering by G. S. 1913, § 8203, which prevents recovery when intoxication is the "natural and proximate cause" of the accident. The burden of proof is upon the employer. The court found against the relator, and its finding is abundantly sustained.

[2] 2. The relator claims that the accident did not occur in the course of Chambers' employment. He was engaged as a solicitor in the grain business and had his home at Bismarck, which was the point from which he worked. He had been using the auto in the course of his business during the day and was returning homeward. The evidence sustains, if indeed it does not require, a finding that he was in the course of his employment. It is much stronger than the evidence in State v. District Court, 166 N. W. 274, which is in some respects similar.

[3] 3. The controversy between the Wyman Company and the insurance company involves the single question whether the insurance policy covered employees outside of Minnesota and the issue is raised by appropriate pleadings between them.

The policy purported to give indemnity in consideration of the payment of the estimated premium and the representations contained in a schedule attached. This schedule stated the address of the insured, the duration of the risk, the location of all places where business operations were to be conducted, the total estimated annual wages, the description of business operations to be insured, and a number of other matters not presently material. It stated the place of business operations to be at Minneapolis and Duluth, giving the office address of the insured at both places, and elsewhere in Minnesota. Under the head of "Description of Business Operations to be Insured," there was the following:

"Grain Commission.

"Clerical force and other employees engaged exclusively in office duties.

"Salesmen, collectors and messengers, traveling in Minnesota.

"Drivers of Automobiles and their helpers.

"Drivers of teams and their helpers."

The Wyman Company did not prepare nor sign this schedule. It was not presented to it. It came attached to the policy from the agents of the insurance company a few days before the expiration of another policy the place of which it was to take. The policy itself gave indemnity as follows:

"(2) Against liability to pay the compensation, and to furnish the medical and surgical treatment provided by the Minnesota Workmen's Compensation Law.

"Condition A. The agreement shall apply to accidents occurring at the place or places described in the Schedule, and shall include also drivers and their helpers, salesmen, collectors and messengers, whose wages are included in the estimated pay roll on which the premium of this policy is based, whereever they may be in the service of the assured, and while engaged in the trade or business described in the Schedule."

The description in the schedule is general in terms. It contains no express territorial limitation of liability, but it does refer to men traveling in Minnesota under the heading quoted. The parties had in mind indemnity for liability arising under the Workmen's Compensation Act. This act applies to accidents outside the state in connection with business done in the state and incident to its conduct. In response to this schedule, if it be considered a proposal for insurance, and this is altogether favorable to the relator, the company issued a policy from which we have quoted above. In that policy is assumed to give indemnity for injuries to or the death of men of the class to which Chambers belonged "whose wages are included in the estimated pay roll on which the premium of this policy is based wherever they may be in the service of the assured and while en-

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gaged in the trade or business described in the schedule." Chambers' wages were included in the estimated pay roll. There is no ambiguity in the policy. If there is any anywhere, it comes when the policy and schedule are put together. The policy proper, in terms not susceptible of misunderstanding, gives just the indemnity which the Wyman Company claims. The insurance company signed and issued the policy, containing the promise of indemnity quoted. It cannot now avoid liability because of the description in the schedule. The court was right in holding the insurance company primarily liable.

Judgment affirmed.

COURT OF APPEALS OF NEW YORK.

TRAVELERS' INS. CO

v.

PADULA CO., INC.*

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—ACTION FOR DEATH.

Despite Code Civ. Proc. § 1902, providing that actions for wrongful death may be maintained by the administrator or executor, *held* that, under Workmen's Compensation Law, § 29, as amended by Laws 1916, c. 622, § 7, where the dependents of an employee killed by the negligence of another not in such employ elected to claim under the act, and the cause of action was assigned to the insurance carrier, etc., the insurance carrier could maintain against the wrongdoer an action for the employee's death.

(For other cases, see Master and Serant, Dec. Dig. § 389.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—POWER OF LEGISLATURE.

Under Const. art. 1, § 19, the Legislature, though restricted by section 18 from abrogating the existing cause of action for death, had power to provide that one negligently killing an employee subject to the Workmen's Compensation Law should be liable to his dependents instead of next of kin.

(For other cases, see Master and Serant, Dec. Dig. § 347.)

Chase and Hogan, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Travelers' Insurance Company against the Louis Padula Company, Incorporated. From an order of the Appellate Division (170 N. Y. Supp. 869) reversing an interlocutory judgment, which overruled a demurrer to the complaint, sustaining the demurrer and dismissing the complaint, plaintiff appeals. Reversed, and interlocutory judgment reinstated and affirmed.

E. C. Sherwood, of New York City, for respondent.

Samuel H. Sternberg, of New York City, for respondent.

COLLIN, J. The action is based upon the provisions of section 29 of the Workmen's Compensation Law (Consol. Laws, c. 67, as amended by

* Decision rendered, Nov. 12, 1918. 121 N. E. Rep. 348.

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Laws 1916, c. 622). The section, prior to amendments (Laws of 1917, c. 705, § 8) inapplicable here, was:

"*Subrogation to Remedies of Employees.*—If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commisison may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier lialiable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the commission may determine by rule in each case."

The complaint alleged in effect: In May, 1915, the plaintiff was, under the Workmen's Compensation Law, the insurance carrier of the Brand & Silverstein Iron Works of which Adolph Littman was an employee. Littman received injuries, solely through the negligence of the defendant, Louis Padula Company, Incorporated, causing his death, under conditions making the law applicable, and the employer and the plaintiff, the insurance carrier, liable. He left surviving as dependents a widow and two minor children, who elected to take compensation under the law, and not to pursue their remedy against the defendant, which was not in the employ of the iron works. In June, 1915, the state Industrial Commission, in due course of proceeding, awarded compensation to the dependents, for the payment of which the plaintiff was and is liable. The dependents duly assigned to the plaintiff, with the approval of the commission, the cause of action against the defendant for negligently causing the death of Littman. Judgment for the sum of $25,000 is demanded.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Special Term overruled the demurrer. The Appellate Division reversed the dcision of the Special Term, sustained the demurrer, and dismissed the complaint on the ground that the action must, under section 1902 of the Code of Civil Procedure, be prosecuted by an executor or administrator of Littman, Section 1902 is:

"*Action for Causing Death by Negligence, etc.*—The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent, who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default,

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by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit."

[1] A civil liability and the right to recover damages for a wrongful act or neglect causing death are created solely by statute. At common law no civil action would lie for causing the death of a human being. Legislative enactment is the exclusive source and boundary of the liability and the remedy. It may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced, and prescribe the measure of damages and the beneficiaries.

[2] The meaning and intent of section 29 is manifestly not clear and certain through its language. We are therefore bound to search for the legislative intent in such facts and through such rules as may, in connection with the language, legitimately reveal it. If it, as determined, is within the scope or capability of the language, it must be within the statute, however obscurely, imperfectly, or inadequately it is expressed. To effect the intent the language may be freely dealt with. Words may be interpolated or shifted in position or enlarged or restrained in their meaning and operation. The expressed legislative intention is the statute. The courts are bound to enforce enacted legislative intent. Archer v. Equitable Life Assurance Society of the United States, 218 N. Y. 18, 112 N. E. 433; Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819.

[3-5] The language of the section reveals and expresses the legislative intention to give to the dependents under the law of the employee within the law, killed by the negligence or wrong of another not in the same employ, a cause of action for the death. It declares that his dependents primarily shall elect, in accordance with the rule of the State Industrial Commission, whether to take compensation under the law or to pursue their remedy against the wrongdoer; if they choose the latter, they shall receive under the law only the deficiency, if any, between the amount "of the recovery against" the wrongdoer actually collected and the compensation awardable under the law, and they—his dependents—cannot compromise the cause of action against the wrongdoer at an amount less than the compensation awardable, except upon the approval of the commission, if the state is the insurance carrier, or of the other insurance carrier, if the state is not the insurance carrier. The recovery is for the benefit of the dependents. If, however, his dependents choose primarily to take compensation under the law they—his dependents—shall assign the cause of action against the wrondoer, if the state is the insurance carrier, to the state for the benefit of the state insurance fund, or, if another is the insurance carrier, to that other. The last paragraph of the section in connection with the other provisions relating to dependents is an adequate declaration that the assignment of the cause of action shall be made by the dependents. If the language were "the cause of action which they have hereby" or "the cause of action which they shall have" against the wrongdoer, instead of "the cause of action against such other," the legislative bestowal upon the dependents of the cause of action for the death would have been indubitable. The intent to effect the bestowal is as clear as the words we have suggested would make it. The section empowers the dependents to assign such a cause of action, empowers, with a restriction, the dependents to compromise such cause of action, empowers the dependents to elect whether they will enforce or assign it, and constitutes them the sole beneficiaries of it, in case they enforce it. Those provisions are

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not purposeless and meaningless. It must be presumed that an enactment has a purpose and an effect and that no absurd nor vain use of language was adopted. It must receive that construction which will make effective its intent. Matter of Jannicky, 209 N. Y. 413, 103 N. E. 715; Matter of Meyer, 209 N. Y. 386, 103 N. E. 713, L. R. A. 1915C, 615, Ann. Cas. 1915A, 263; Matter of Dowling, 219 N. Y. 44, 113 N. E. 545. Those provisions express that within the legislative mind and comprehension the section provided to the dependents of the employee a cause of action inedpendent of, and not that created by, section 1902, for the negligently caused death.

The language discloses that there were, further, within the legislative mind and comprehension these effects; in case the dependents elect to enforce against the wrongdoer the cause of action, they shall pursue, in so far as applicable under the language, the remedy provided in section 1902 of the Code of Civil Procedure. An executor or administrator of the deceased employee, as the representative or agent (Hamilton v. Erie Railroad Co., 219 N. Y. 343, 350, 114 N. E. 399, Ann. Cas. 1918A, 928) of the dependents, may, the dependents having so elected, maintain the action. The action is not maintainable, however, until the dependents have determined that it shall be instituted. The right of action is a property right of all the dependents (Matter of Meekin v. Brooklyn H. R. R. Co., 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635), and they are the sole beneficiaries of its enforcement. The provisions of section 1903 of the Code of Civil Procedure, relating to the distribution of the damages, are inoperative. The amount of the recovery actually collected, within the amount of the compensation awardable to the dependents under the law, must be distributed as the compensation would have been awarded. The remedy provided in section 1902 is by the language of section 29 peculiar to the enforcement by the dependents of their cause of action of which it is not an integral part. The Legislature confined the pursuit of that remedy to the dependents, in behalf of simplicity and convenience in procedure. In case the dependents elect to assign the cause of action, the assignment creates its ordinary and established effects. It transfers to and vests in the assignee the cause of action. If the assignment is to the state, the cause of action is thereby made the property of the state; if to another, the cause of action becomes by virtue of the assignment the property of that other. In the case at bar the dependents assigned the cause of action to the plaintiff. A cause of action inherently includes and comprehends, in the absence of restrictive language, the right to maintain an action upon the claim or matter which also is inherently included in it. "Cause of action" is the right to prosecute an action with effect. Douglass v. Forrest, 4 Bing. 686. The right to maintain the action may by statute be withheld from the owner of the cause of action and given to another, because of convenience or simplicity in procedure, as is done by the provisions of section 1902, or by the provisions of section 29 that the Industrial Commission may prosecute in behalf of the state the causes of action assigned under the section to, and owned by, the state. It is, however, an elementary and fundamental rule of law and of property that the owner of a cause of action has the right, which is a part of it, in the absence of a valid restriction, to prosecute it in the ordinary and legal method and manner in the courts. There is not related nor applicable to the cause of action of plaintiff any restriction or provision forbidding or disabling him from prosecuting it. He needed no express empowerment, as did the Industrial Commission. The power was in and a part of the assigned cause of action, and became the plaintiff's.

[6] The provision of the Constitution of the state, "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation" (article 1, § 18), is not relevant to the determination of the rights arising, through section 29, to the dependents of the deceased employee. The people of the state, in section 19 of article

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1 of the Constitution, restricted that provision from disabling the Legislature to enact laws for the payment, in any method it selected, of compensation for death of employees resulting from injuries to them, and to provide that the right of such compensation and the remedy therefor shall be exclusive of all other rights and remedies for death resulting from such injuries. The power to provide that a party who negligently kills an employee under the act shall be liable to the dependents of the employee, as defined by the act, and not to his next of kin, is clearly restored to the Legislature by the later section. See Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795.

The judgment should be reversed, and the interlocutory judgment be reinstated and affirmed, with costs in this court and in the Appellate Division.

Hiscock, C. J., and Cuddeback, McLaughlin, and Crane, JJ., concur.

Chase and Hogan, JJ., dissent.

Judgment accordingly.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, FIRST DEPARTMENT.

NULLE ET AL.

v.

HARDMAN, PECK & CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—"HAZARDOUS EMPLOYMENT"—"EMPLOYEE."

Night engineer, employed in piano factory, manufacture of pianos being hazardous employment, within Workmen's Compensation Law, § 3, subd. 1, being embraced in section 2, group 16, was an "employee in a hazardous employment," under section 3, subd. 4, defining "employee" as meaning person engaged in one of the occupations enumerated in section 2, or in service of employer whose principal business is that of carrying on "hazardous employment."

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—EXCLUSIVE CHARACTER OF REMEDY—EXCEPTION.

Under Workmen's Compensation Law, §§ 10, 11, remedy of injured servant, or dependents of deceased servant, under statute, is exclusive; no cause of action arising at common law or under Employers' Liability Act, except where employer has failed to secure payment of compensation as provided.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Appeal from Special Term, New York County.

Action by Sophie Nulle and another, as executors, etc., of Julius Nulle, against Hardman, Peck & Co. From an order denying a motion for judgment on the pleadings, defendant appeals. Order reversed, and motion granted, with leave to plaintiffs to serve an amended complaint.

* Decision rendered, Dec. 13, 1918. 173 N. Y. Supp. 236.

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Argued before Clarke, P. J., and Dowling, Smith, Page, and Shearn, JJ.

James J. Mahoney, of New York City (George J. Stacy, of New York City, on the brief), for appellant.
Owen W. Bohan, of New York City, for respondents.

DOWLING, J. The real question involved herein is the sufficiency of the complaint, which defendant claims sets forth no cause of action. The action is brought to recover damages for the death of plaintiff' testator, Julius Nulle, who was a night engineer employed by defendant in its piano factory at 552 West Fifty-Second street, in the city of New York. It is set forth in the complaint that Nulle, while acting as night engineer in defendant's employ on November 5, 1916, in the ordinary course of his employment and under the direction, supervision, and control of defendant, was instructed to dispose of refuse collected in the piano factory, which was of a highly inflammable nature, and was placed in cans to be disposed of by decedent under defendant's supervision; that decedent was directed by defendant, in the ordinary course of his employment, to burn the refuse in defendant's furnace. It is alleged that the furnace was old, worn, defective, and unsafe, to defendant's knowledge, despite which no instructions as to its danger were given by it to Nulle; that the usual and ordinary guards in general use on furnaces of this character were absent; that, because of these conditions, Nulle, while in the performance of his duties as engineer in defendant's employ, and while actually placing the highly inflammable material in the furnace, was severely burned as the result of the ignition of the refuse by a back draft, which in turn set fire to Nulle's clothing, and inflicted injuries from which he died more than a month thereafter. Among the specifications of defendant's negligence are that the furnace was taxed beyond its capacity, and was entirely unsafe and insufficient for the work for which it was used; that guards were absent; that there was no reasonable or proper care, test, or inspection; that the Employers' Liability Act (Consol. Laws, c. 31, §§ 200-204) had not been complied with, nor had chapter 657, Laws of 1906; that the furnace used in an unsafe and improper manner; that Nulle's death was due to the defective condition of the ways, works, machinery, plant, tools, and implements, owned, operated, and controlled by defendant, which condition could have been discovered by defendant by the use of reasonable and proper care; and that defendant had knowledge thereof or could have discovered the same with reasonable diligence. It is further averred that the notice required by the Employer's Liability Act had been duly given.

Defendant contends that the complaint is insufficient, and does not state facts sufficient to constitute a cause of action, inasmuch as under its allegations the only remedy available was that provided by the Workmen's Compensation Act (Consul. Laws, c. 67), which is exclusive, and that the only exception is to be found in case that employer has failed to secure the statutory compensation as provided in the act, in which event the plaintiff must set forth in his complaint the necessary allegations to bring himself within the exception. In this contention we think the defendant is correct.

[1-4] The complaint alleges that decedent was employed in a piano factory, and the manufacture of pianos is a hazardous employment, within the meaning of the Workmen's Compensation Law (section 3, subd. 1), being embraced in group 16 as defined in section 2 thereof. Decedent was an employee in a hazardous employment, under the terms of section 3, subd. 4. His status as an employee within the terms and protection of this statute is fixed by the allegations of the complaint. Section 10 of the Workmen's Compensation Law, so far as material, at the time of plaintiff's injury, reads as follows:

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"Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. * * *"

Section 11 thereof at the same time provided:

The liability of an employer prescribed by the last proceeding section shall be exclusive, and in the place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or any one otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section 50 of this chapter, an injured employee or his legal representatives in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury."

Thus by the provisions of the Workmen's Compensation Law, in effect at the time of decedent's death, under the state of facts shown by the complaint, deceased was an employee of defendant engaged in a hazardous employment, and, having received injuries arising out of and in the course of his employment, the remedy provided by the act became exclusive, and no cause of action arose either at common law or under the Employers' Liability Act. The only exception to this rule would be in case the employer had failed to secure the payment of compensation for his injured employees and their dependents as provided in the act. But this is a matter for the plaintiff to plead, if he desires to seek a recovery outside the act. That the remedy provided under the act is exclusive, where it applies, was held in Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795. That the burden is upon the plaintiff to set forth the facts showing that the act did not apply is clearly indicated in the opinion of this court in Shinnick v. Clover Farms Co., 169 App. Div. at page 237, 154 N. Y. Supp. 423:

"There is no allegation that defendant has failed to secure the payment of compensation for his injured employees or their dependents as provided in section 50 of the act (as amended by Laws 1914, c. 316), or that plaintiff has, for that reason, elected to sue in the courts. The question we have to consider, therefore, is whether the Workmen's Compensation Law provides compensation for such an injury as that which plaintiff has suffered.

This case was cited by the court as its authority for its decision in Nilsen v. American Bridge Co., 176 App. Div. 915, 162 N. Y. Supp. 1133, affirmed 221 N. Y. 12, 116 N. E. 383.

Inasmuch as plaintiffs have failed to set forth the necessary facts showing that they come within the exception, and that they are not limited to the exclusive remedy provided by the act, the complaint was demurrable, and the motion for judgment should have been granted.

The order appealed from will therefore be reversed, with costs, and the motion for judgment on the pleadings in favor of the defendant will be granted, with $10 costs, with leave to the plaintiffs to serve an amended complaint within 20 days upon payment of said costs. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, SECOND DEPARTMENT.

PALERMO

v.

ERIE R. CO.*

2. MASTER AND SERVANT—INJURY IN INTERSTATE COMMERCE—QUESTION FOR JURY.

Whether an employee, injured in taking a locomotive to the storage track for the night, was engaged in interstate commerce, within the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665), inferred from the fact that the locomotive was used day by day in an interstate trip, was a question for the jury.

(For other cases, see Master and Servant, Dec. Dig. § 284[1].)

4. MASTER AND SERVANT—INJURY—ABSENCE OF LIGHT ON ENGINE—SERVANT'S KONWLEDGE.

Absence of light on a locomotive moving in a yard is not negligence, as to an employee who knew its position, and was injured after jumping from it with a lantern in his hand, creating the absence of light.

(For other cases, see Master and Servant, Dec. Dig. § 101, 102[10].)

Appeal from Trial Term, Orange County.

Action by Michele Palermo against the Erie Railroad Company. From a judgment on a verdict for plaintiff, and from an order denying a motion to set aside the verdict and for a new trial, defendant appeals. Reversed, and new trial granted.

The action was brought under the federal Employers' Liability Act for negligence which resulted in the loss of plaintiff's hand. The case was submitted to the jury upon special findings. The jury found both the plaintiff and the defendant negligent, that the total amount of plaintiff's damage was $8,000, and that it should be reduced by the sum of $2,000 for the negligence of the plaintiff, leaving a recovery of $6,000.

Argued before Jenks, P. J., and Thomas, Rich, Blackmar, and Jaycox, JJ.

Elbert N. Oakes, of Middletown, for appellant.
J. D. Wilson, Jr., of Newburgh, for respondent.

BLACKMAR, J. The action was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]). As the defendant was engaged in interstate commerce, it was necessary for the plaintiff to establish that he also, at the time of the injury, was employed in interstate commerce. He was then engaged in placing a locomotive, which had come into Newburgh from Jersey City, on a storage track at West Newburgh. The solution of the question of whether the plaintiff was at the time of his injury engaged in interstate commerce turns upon the question whether the locomotive was an instrumentality being used at the time in interstate commerce.

* Decision rendered, Dec. 27, 1918. 173 N. Y. Supp. 456.

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On the day in question the locomotive, known as No. 545, arrived at Newburgh on its return trip from New Jersey at 8:06 p. m., and was delivered by the engineer to an engine repairer or hostler, who took it to West Newburgh and delivered it at an ash pit. There the fires were cleaned, coal, water, and sand were put in, and the engine was made ready for the next day's run. From the ash pit it was taken to a storage track, and while placing it on the storage track and coupling it, for what purpose does not appear, to another engine standing on the track, the plaintiff, through the negligence, as the jury have found, of another employee of defendant, suffered injuries that resulted in the loss of a hand. On the following day the locomotive was put back on the same run, and it was on that run every day in the month, except when in the repair shop. The defendant called its foreman, who testified that "these engines" could be used for any purpose, that in the case of an emergency they could be used for switching, and that they had been so used. But generally this engine was used on what was known as the "Tuxedo Express" between Newburgh and Jersey City. The presiding judge treated this as a question of law and decided that the plaintiff, in aiding to put the locomotive on the storage track, was engaged in interstate commerce. To this the defendant excepted.

The appellant relies principally on Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas 1918B, 54 (Holmes, J), Giovio v. New York Central Railroad Co., 176 App. Div. 230, 162 N. Y. Supp. 1026 (Scott, J.) and Central R. Co. v. Paslick, 239 Fed. 713, 152 C. C. A. 547; the two latter cases being decided largely on the authority of the one first cited. In the Winters Case the plaintiff was injured in repairing an engine on October 21, 1912. The last time the engine had been used before the injury was on October 18th, when it hauled into Marshalltown, Iowa, a train carrying both interstate and intrastate commerce. On October 21st, after the plaintiff's injury, it was used in hauling a train also carrying both interstate and intrastate commerce out of Marshalltown. It was held that in repairing the engine the plaintiff was not engaged in interstate commerce. A distinction was drawn between a locomotive that is not permanently devoted to any kind of traffic and a roadbed or bridge permanently devoted to interstate traffic. Justice Holmes said:

"An engine as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. * * * Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

It has been established by the decisions of the United States Supreme Court that an employee engaged in repairing a bridge or track that is necessarily used for interstate commerce is himself engaged in interstate commerce. N. Y. Central R. R. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; Pedersen v. Del., Lack. & West. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. But it seems that this rule does apply where they are engaged in construction work, which has not at that time been devoted to interstate commerce—for instance, in building a new tunnel, that has not yet been used. Raymond v. Chi., Mil. & St. P. Ry. Co., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583. The distinction between repair work on the track or bridge or tunnel and repair work upon the locomotive depends upon the fact that one is necessarily devoted to interstate commerce and the other is not; but if it can be shown that the locomotive is devoted to interstate commerce, I think that any work in preparing it for the run would be directly concerned with interstate commerce. In Nor. Car. R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; it was held that the

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acts of the defendant in error, in inspecting, oiling, firing and preparing his engine for a trip outside the state, were acts performed as part of interstate commerce, and the circumstance that the insterstate freight cars had not yet been coupled is legally insignificant. In St. L. & San Francisco Ry. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914, 156, it was held that after a train carrying interstate commerce had arrived at the station, the work of breaking up the train and moving the cars to the appropriate tracks for making up new trains for further destination, or for unloading, was as much a part of interstate transportation as the movement across the state line. In Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, where the question was regarding the automatic couplers upon cars used in moving interstate commerce, it was held that where a dining room car was regularly used in interstate commerce and had ended one trip and was waiting for another, it was still subject to the law regarding automatic couplers. In Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, it was held that a switchman engaged in switching, being through work and crossing the tracks on his way out of the yard, was still engaged in interstate commerce. In Darr v. Baltimore & O. R. Co. (D. C.) 197 Fed. 665, it was held that the repair of a locomotive regularly and usually employed in interstate commerce was within the act.

[1] I think that, if the locomotive in question was regalarly devoted to the work of drawing the Tuxedo Express from Newburgh to Jersey City and back to Newburgh, and so in interstate commerce, then everything that was done incidentally to this use of the locomotive was also directly related to interstate commerce. The work of the locomotive was such that it had to be stored during the night. It had to be prepared for its run. It was impossible to leave it standing on the track at Newburgh. It had to have coal, water, and sand, and the fires had to be attended to; and if permanently devoted to that run, all of the work of taking care of the engine overnight and preparing it for its next day's work was just as much interstate commerce as drawing the cars from Newburgh to Jersey City. On the other hand, if this locomotive was not, in the regular course of business, assigned to this run, and its use next day undertermined when it was laid up for the night, then the doctrine of the Winters Case, supra, would govern.

[2] I am of opinion that this presented a question of fact. The fact that it was used day by day in this work was evidence that it was permanently devoted to it. The inference that it was so permanently devoted to interstate commerce is permissible from the evidence, but I think it does not necessarily flow therefrom, and that the question should have been submitted to the jury.

[3, 4] I now come to a question that, so far as I know, has not been decided. The trial judge submitted two questions to the jury as to the defendant's negligence. If the jury found either one of these questions in the affirmative, a verdict for the plaintiff would be justified. The jury answered both in the affirmative, finding that the defendant was negligent in two respects: First, in not having a light on the rear of the tender when backing up upon the storage track; and, second, in not stopping in response to the plaintiff's signal. I think that there was no basis in the evidence for the submission of the first question. This would be entirely harmless, except for the law of apportionment of damages on a finding of contributory negligence. If there was no such rule as that, the finding on the second question would sustain the verdict, and that on the first question would be immaterial; but as there is such a rule it is obvious that when the jury compare the amount of the plaintiff's contributory negligence with the negligence of the defendant it makes a substantial difference whether the defendant was negligent in two particulars or in one. The rule is that—

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"Where the causal negligence is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both." Seaboard Air Line v. Tilghman, 237 U. S. 499, 35 Sup. Ct. 653, 59 L. Ed. 1069.

In order that the jury may properly apply this rule, they must have the proper factors. As we have eliminated one of the factors which they presumably used, there must be a new trial.

The question submitted to the jury was as follows:

"Was there negligence on the part of the defendant's servant who was operating engine No. 545 in not having a light on the rear of said engine, which was a proximate cause of the plaintiff's injury?"

There was some evidence that it was the duty of the hostler in charge of the engine to see to the lights on the engine. This engine was in charge of a fellow employee of the plaintiff, a hostler, and the plaintiff. It was backing down the storage track. Plaintiff stood on the tender with a lantern in his hand. When he had reached a point 60 feet from an engine which was standing there, and to which it was to be coupled, he jumped down, taking the light with him, and leaving dark the forward part of the tender as it approached. Under these circumstances the plaintiff knew all about the situation of the locomotive. He testified that, notwithstanding there was no light, he saw the locomotive. He saw it when it was 15 feet away, for he waved his lantern as a signal to the engineer to stop. He saw it when it was 10 feet away, according to his own evidence, when it looked as if it had stopped.

It is undoubtedly the duty of a railroad company to give warning, either by light, or sound, or in some other way, when it is moving its locomotive in a yard where employees are apt to be at their work, so that those whose duty may call them upon the track shall have notice of its approach. I cannot see how the absence of a light on this locomotive can be negligence as to the plaintiff, and I think it plain that the plaintiff assumed any risk he might run from the danger caused by the absence of the light, for he know all about the situation, and in fact his very act in jumping down with the light in his hand created the condition of which he complains. It was error, therefore, to submit to the jury the first question regarding the defendant's negligence.

The judgment and order should be reversed, and a new trial granted; costs to abide the event. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

CRINIERI

v.

GROSS ET UX.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—ELECTION OF REMEDIES.

Where an injured employee, in pursuance of Workmen's Compensation Law, § 11, brought an action for damages against a married woman as

* Dceision rendered, November 13, 1918. 172 N. Y. Supp. 695.

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his employer, and the suit was dismissed, the claimant, by the election to sue her, is barred from subsequently seeking an award under the act against the husband and wife jointly; the evidence showing that the wife was in fact the employer.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

John M. Kellog, P. J., and Woodward, J., dissenting.

Appeal from State Industrial Commission.

Proceeding by Antonio Crinieri under the Workmen's Compensation Law, opposed by Louis Gross and Marie his wife, uninsured employers. From an award of the State Industrial Commission, the employers appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Scott & Sneed, of Newburgh, for appellants.

Merton E. Lewis, Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission.

HENRY T. KELLOGG, J. The claimant, having been injured through an accident, brought an action to recover damages against one Marie Gross, alleging that she was his employer, that she had failed to secure compensation for her employees, and that he was injured through her negligence. Marie Gross in her answer alleged that the employer of the claimant was not herself, but one Louis Gross, her husband. The complaint was dimissed. Thereafter the claimant filed a notice of claim, in which, in answer to the question, "Name of Employer?" he wrote "Louis Gross, or Marie Gross, his wife." The commission made an award against Louis Gross *and* Marie Gross, both of whom were found to be the employer of the claimant.

A difficulty confronting the commission was the fact that, if Marie Gross was the employer, the claimant had previously made his election to bring an action against her, and therefore could not later have an award upon a claim afterwards field. Workmen's Compensation Law (Consol. Laws, c. 67) § 11; Pavia v. Petroleum I. W. Co., 178 App. Div. 345, 164 N. Y. Supp. 790. This difficulty was overcome by the very easy method of merely making a finding that the claimant was employed by Marie Gross and Louis Gross jointly, to sue whom as partners an election had never been made. There was no legal evidence that Marie Gross and Louis Gross were employers of the claimant. Moreover, there was no legal evidence that Louis Gross was the employer. Both the notice of injury and the claim for compensation named "Louis Gross *or* Marie Gross *or* both of them." The only positive evidence upon the subject was given by the claimant, who testified that Marie Gross hired him, directed him, and paid him, and in answer to the question, "You were employed by Marie Gross on the 24th day of March, 1917?" replied "Yes, sir." There was, therefore, no foundation whatsoever for the finding of the commission that the claimant was employed by Marie Gross *and* Louis Gross. On the contrary, it was proven that he was employed solely by Marie Gross, and as against her the claim was barred by an election previously made.

The award should be reversed, and the claim dismissed.

Lyon and Cochrane, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). "The institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the rights he really possesses. Kinney v.

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Kiernan, 49 N. Y. 164." McNutt v. Hilkins, 80 Hun. 235, 239, 29 N. Y. Supp. 1047, 1050.

"The principles governing election of remedies are necessarily based upon the supposition that two or more remedies exist. If in fact or in law only one remedy exists, there can be no election by the pursuit of another and mistaken remedy. It is a well-established rule that the choice of a fancied remedy that never existed, and the futile pursuit of it, either because the facts turn out to be different from what the plaintiff supposed, though the first action proceeds to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy." 9 Ruling Case Law, p. 962, § 9.

"The question depends for its answer upon the law of election of remedies. Where two inconsistent remedies, proceeding upon irreconciable claims of right, are open to a suitor, the choice of one bars the other. But, to have that effect, the remedies must be inconsistent.' Ratchford v. Cayuga Co. Cold Storage & W. Co., 217 N. Y. 565, 568, 112 N. E. 447, 448 (L. R. A. 1916E, 615).

Woodward J., concurs.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

KOLB

v.

BRUMMER ET AL.*

1. INSURANCE—CASUALTY INSURANCE—LIABILITY OF INSURER.

Under an employers' liability insurance policy, providing that no assignment or change of interest should bind the company, unless its consent be indorsed on the policy, where insured's wife inherited and carried on insured's business after his death, insurance company was not liable for an injury occurring to servant in such business after she had sent the policy to the company to be transferred, but before insurer indorsed the transfer of interest, although the insurer, without knowledge of the injury to servant, afterwards accepted the balance of earned premiums.

(For other cases, see Insurance, Dec. Dig. § 392[8].)

2. INSURANCE—"CANCELLATION"—TRANSFER OF POLICY.

Defense of insurance carrier to claim of injured employee that injury to employee occurred after death of insured employer, and prior to insurance carrier's indorsement of consent to transfer of policy to insured's successor in business, did not constitute a "cancellation" of the insurance contract, within Workmen's Compensation Law, § 54, subd. 5, requiring notice of cancellation.

(For other cases, see Insurance, Dec. Dig. § 232.)

(For other cases, see Words and Phrases, First and Second Series, Cancellation.)

Kellogg, P. J., and Woodward, J., dissenting.

* Decision rendered, November 22, 1918. 173 N. Y. Supp. 72.

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Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by John Kolb to obtain compensation for injuries, opposed by Meta Brummer, employer, and the New Amsterdam Casualty Company, insurance carrier. There was an award of compensation, and the insurance carrier appeals. Award reversed as to insurance carrier.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Frederick Mellor, of New York City, for appellant.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Robert W. Bonynge, of New York City, for State Industrial Commission.

LYON, J. Richard Brummer, the husband of the defendant Meta Brummer, was engaged in the business of trucking. He held a policy issued by the defendant New Amsterdam Casualty Company, of date August 31, 1916, which ran for one year, and upon which he had paid the estimated premium. He died June 28, 1917, leaving a will by which he gave all his property to his wife. His wife took charge of and conducted his business for about two weeks during his last sickness, and after his death continued the business in the same way. About the middle of July, 1917, as she testifies, she informed the broker through whom the insurance was procured of the death of her husband, and delivered to him the policy, to mail the same to the insurer. He wrote on the outside of the policy the words:

"Kindly transfer this insurance to Meta Brummer, and return this policy to me. Buxbaum."

—and mailed the policy to the insurance company, as he testified. The insurer attached to the policy a writing, dated August 22, 1917, as follows:

"The interest in this policy is hereby transferred, from 12 o'clock noon of this date, to Meta Brummer."

On the preceding day, August 21, 1917, the claimant was in the employ of Meta Brummer, and about 9 o'clock in the morning suffered an accidental injury to the index finger of his right hand, which resulted in the loss of the finger. On August 23, 1917, Meta Brummer, as employer, filed a claim for compensation. On October 8, 1917, the company presented a bill to her for additional insurance premium under said policy, which she paid in full. The policy had expired the August preceding. The insurance company claims it was not notified of the accident until November 12, 1917. She made a report of the injury August 23, 1917, as the employer, and thereafter an award of compensation was made to the claimant against her as an employer. On her application the award was opened, a rehearing had, and an award made against her and the New Amsterdam Casualty Company, as insurer, from which this appeal has been taken.

The policy contained the following condition:

"Assignment. Condition J. No assignment or change of interest under this policy shall bind the company, unless its consent shall be indorsed hereon or attached hereto, signed by a duly authorized officer of the company."

[1] No act was done by Meta Brummer in reliance upon the belief that the company had consented to the transfer of the policy to her, which would estop the appellant. The liability of the insurer did not exist as to Meta Brummer until it had made a binding contract with her. It was not an insurance of property, but against personal liability,

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and hence the insurance was personal. The performance of this condition of the policy was essential to create liability against the insurer to another than the person to whom the policy was issued. An application for insurance to secure compensation would not charge the insurer until a contract was made. I do not think the collection of the balance of the earned premium estops the insurer from contesting liability under the contract. The bill was not presented until October 8th, and the company had no knowledge of the accident until November 12.

[2] Nor do I think that section 54, subd. 5 (Consol. Laws, c. 67) is effective. This was not a cancellation of an insurance contract, within the meaning of that term as used in that section. The parties had the right to insert any lawful conditions in the contract. Allen et al. v. German-American Ins. Co. of N. Y., 123 N. Y. 6, 13, 25 N. E. 309; Dwight v. Germanic Life Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; Gans v. Ætna Life Ins. Co., 214 N. Y. 326, 108 N. E. 443, L. R. A. 1915F, 703.

[3] The defendant insurance company might have had a good reason for not assenting to a transfer of interest. The management of the business had changed, and they were no longer protected by the oversight of the husband. While the commission has the power to determine whether the policy still existed, it must determine that question on recognized principles of law. Matter of Skoczlois v. Vincour, 221 N. Y. 276, 116 N. E. 1004.

The award must be reversed, so far as it is against the New Amsterdam Casualty Company

Cochrane and Henry T. Kellogg, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). The Employers' Liability Law is designed to charge upon the hazardous employment the risks flowing from it, and to protect the employee therefrom. Security for compensation is not required for the benefit of the employer, but solely for the benefit of the employee. It is a burden cast upon the employer and the business, to make sure to the employee the payment of compensation. It is a misdemeanor for the employer to carry on the business without insurance, and, when the insurance is effected, notice of the fact is given to the employee, so that he may work in confidence that compensation which he may be entitled to will be paid. Section 51. The insurance is more than a provision to reimburse the employer for the amounts paid by him, as the liability of the company is not affected by his insolvency or bankruptcy. Subdivision 3, § 54. The insurance cannot be canceled "within the time limited in such contract for its expiration," except after notice of 10 days to be served upon the employer and the commission. Section 54, subd. 5. The object of this is to enable the commission to see that the law is obeyed, and that no interval shall elapse during which the security for the employee does not exist. If the insurance is in the state fund, it cannot be withdrawn except upon 30 days' notice to the commission, and after other security for the employees has been provided. Section 100. I think it follows, from these and the other provisions of the law, that when security is given for a particular time the employee cannot be deprived of its benefits, except in the manner provided by law, and by cancellation of the policy on notice to the commission. It would not be within the spirit of the law to permit the employer and the insurer to vacate the policy, and deprive the employee of security without any notice to him or the commission. This policy never was canceled in the manner provided by law. The loss of the injury happened during the term of the contract, and the company is liable to the employee. The insurance company is in the same position as the state fund, with a continuing liability until the policy is canceled, as required by the law.

There is nothing in the policy to the contrary. It does not provide

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that it shall be void if the ownership of the business changes. It simply provides that an assignment or change of interest shall not be binding on the company without its written consent. At the issuing of the policy an initial premium is paid, with the understanding that from time to time the pay roll may be examined, and additional premiums may be required and paid by the employer. If the assignment is not binding upon the company, it may treat the original employer as still liable to it for the performance of every condition of the policy; but the employer by assignment or death cannot deprive the employee of his surety and free the company from liability.

In this case the widow of the employer, who was also the executrix, residuary legatee, and devisee under his will, continued the business. She delivered the policy to the broker, who obtained it, with the request that the company consent to the transfer to her. It was immediately forwarded by him to the company, and was received by it about July 13th for transfer. It was then its duty to give or refuse its consent. It knew that the business could not be conducted without insurance. It could not retain the policy for a month, and the day after the loss consent to the transfer, to take effect on that day. By adjusting the premiums with the widow after the loss, and exacting from her the full carrying charges from the death of the husband, fairly recognizes that the policy was in existence all of the time, and renders it inequitable for it now to assert that for the month which it collected the premium it had elected to treat the policy as not in force. The consent should be treated as made as of the day when it was the duty of the company to make it or refuse it. By making it the insurer showed its approval of the risk. The approval may be treated as relating back to the time when the policy was received; the date of the consent being treated as surplusage.

I favor an affirmance.

Woodward, J., concurs.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, SECOND DEPARTMENT.

WOLFF

v.

FULTON BAG & COTTON MILLS.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MINORS.

The Workmen's Compensation Act is not a bar to a common-law action for damages by an infant, employed in violation of Penal Law, § 1275, and Labor Law, §§ 70, 93.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

2. MASTER AND SERVANT—INJURIES TO SERVANT—LEGALITY OF EMPLOYMENT.

Violation of Labor Law, § 81, that machinery of every description shall be properly guarded, etc., is evidence of negligence, even in an action by an infant illegally employed under sections 70, 93.

(For other cases, see Master and Servant, Dec. Dig. § 121[2].)

* Decision rendered, December 6, 1918. 173 N. Y. Supp. 75.

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Appeal from Trial and Special Term, Kings County.

Action by Mary Wolff, an infant, etc., by Nora Wolff, her guardian ad litem, against the Fulton Bag & Cotton Mills. From a judgment dismissing the complaint, and an order granting defendant's motion for judgment on the pleadings, plaintiff appeals. Reversed, and remitted to Supreme Court for trial.

Argued before Thomas, Mills, Putnam, Kelly, and Jaycox, JJ.

Henry M. Dater, of Brooklyn (Jay S. Jones, Edward J. Fanning, and L. Victor Fleckles, all of Brooklyn, on the brief), for appellant.

James J. Mahoney, of New York City (George J. Stacy, of New York City, on the brief), for respondent.

KELLY, J. The defendant moved for judgment upon the pleadings, consisting of the complaint, the answer, and a reply, compelled by the defendant. The affirmative allegations of the defendant in the third defense pleaded, concerning the business carried on by it, the nature of the plaintiff's work in the defendant's factory, and the happening of the accident, amplify to some extent the formal allegations in the complaint. All of these allegations are therefore to be considered in passing upon the questions presented by the appeal.

The complaint alleges, and it is admitted and affirmatively alleged in the answer, that defendant is a corporation engaged in the business of manufacturing burlap and cotton bags in Brooklyn, N. Y., maintaining and operating power presses; that on December 18, 1916, the plaintiff was working as an operator on one of defendant's said presses, and that she sustained accidental personal injuries while so employed by having her hand crushed and amputated in the press. The complaint alleges that on the day the accident happened the plaintiff was under the age of 16 years, that the infant plaintiff was employed by the defendant to operate the machine, and that her injuries were caused by the negligence of the defendant and without negligence on the part of the plaintiff. It charges that the employment of plaintiff was unlawful, and that defendant had failed to procure an employment certificate provided for in the Labor Law. It is also alleged in the complaint that the machine at which plaintiff was working had no guard as required by statute, that it was the duty of defendant to provide the plaintiff with a reasonably safe place to work and a reasonably safe machine with which to perform her work, and that defendant failed and neglected to perform its duty, and allowed the machine to become dangerous and defective, in that it was not equipped with any proper or sufficient guard. The plaintiff, in addition, alleges facts showing liability of defendant under the so-called employers' liability sections of the Labor Law (chapter 31, Consolidated Laws, §§ 200-204), and alleges service upon defendant of the notice required by that statute.

The plaintiff, directed to reply to the new matter set up as a defense (Code of Civil Procedure, § 516), admitted defendant's affirmative allegation as to its business, and operation of power presses, also that at the time of the accident plaintiff was employed in defendant's place of business as an operator and feeder of one of said printing presses. The defendant pleaded as part of its third separate defense, that exclusive compensation for any injuries sustained by plaintiff while employed in defendant's factory was provided for in the Workmen's Compensation Law (Consol. Laws, c. 67), and averred that it had procured insurance and was insured pursuant to section 50 of that law, and had otherwise complied with the statute so as to secure compensation to its employees for injuries sustained. In plaintiff's reply she denied that she was limited to the compensation provided by the Workmen's

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Compensation Law, insisting that she had the right to maintain a common-law action for damages against the defendant.

Upon the defendant's motion for judgment upon the pleadings, the learned judge at Special Term held that plaintiff could not sue at common law or under the Employers' Liability Act; that she was an employee of the defendant, and must have recourse to the Workmen's Compensation Law, which in his opinion was a complete bar to any other right of recovery. He cited the cases of Kenny v. Union Railway Co., 166 App. Div. 497, 152 N. Y. Supp. 117, and Ide v. Faul & Timmins, 179 App. Div. 567, 166 N. Y. Supp. 858, as authority for his conclusion that the fact that the employment of plaintiff was illegal "did not preclude her recovery under the Compensation Act."

[1, 2] We reach the conclusion that the Workmen's Act is not a bar to the infant plaintiff's common-law action for damages. Her employment in the defendant's factory on the day of the accident was unlawful, the defendant had no right to employ her, and in doing so it was guilty of a misdemeanor. Penal Law, § 1275 (Consol. Laws, c. 40). There can be no mistake as to the positive provisions of the law of this state in force at the time of the accident. The Labor Law contains the following:

"Sec. 2. *Definitions—Employee.*—The term 'employee,' when used in this chapter, means a mechanic, workingman or laborer who works for another for hire. * * *"

"Sec. 70. *Employment of Minors.*—No child under the age of fourteen years shall be employed, permitted or suffered to work in or in connection with any factory in this state, or for any factory at any place in this state. No child between the ages of fourteen and sixteen years shall be so employed, permitted or suffered to work unless an employment certificate, issued as provided in this article, shall have been theretofore filed in the office of the employer at the place of employment of such child. * * *" As amended by Laws 1913, c. 529, § 2.

"Sec. 93. *Prohibited Employment of Women and Children.*—(1) No child under the age of sixteen years shall be employed or permitted to work in operating or assisting in operating any of the following machines: * * * Job or cylinder printing presses having motive power other than foot."

And it is provided in section 81 of the Labor Law that:

"Machinery of every description shall be properly guarded and provided with proper safety appliances or devices. All machines, machinery, apparatus, furniture and fixtures shall be so placed and guarded in relation to one another as to be safe for all persons." As amended by Laws 1913, c. 286, § 1.

Violation of the statute is evidence of negligence in an action such as this, based upon the allegation that the defendant failed in the duty it owed to the infant plaintiff while she was in the factory, whether her employment was legal or illegal. The object of these statutes and the policy of the state with reference to the employment of minors has been repeatedly stated. Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811; Koester v. Rochester Candy Works, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783, 16 Ann. Cas. 589; Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 519. In employing this child under 16 years of age to work upon its power press, defendant violated the public policy of the state as declared by the foregoing statutes. We think that, in enacting the Workmen's Compensation Law with reference to the rights and remedies of employers and employees the Legislature referred to legal employment. To construe the law as permitting an employer, who has employed children illegally in work expressly forbidden by law, to insist that they are deprived of their common-law rights and must look to the Compensation Act for

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relief, would be to nullify the provisions of the Labor Law and to disregard the public policy of the state.

In enacting the Workmen's Compensation Law, the Legislature did not prescribe a code of procedure for persons engaged in unlawful or criminal occupations. The Court of Appeals, in deciding the constitutionality of the Workmen's Compensation Law in so far as it deprives the employee of his common-law right of action, said the subject should be viewed in the light of modern industrial conditions, spoke of wasteful and protracted litigation, and sustained the act from considerations of the welfare. Matter of Jensen v. Southern Pacific Co., 215 N. Y. 514, at page 526, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276. And the decision of the Supreme Court of the United States goes upon the same ground. N. Y. Central R. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. 1917D, 1, Ann. Cas. 1917D, 629. But it must be apparent that the protection of young children from dangerous employments, to which they may be drawn by necessity, or by greed of parents or employers, or through childish inexperience or ignorance, is as important to the general public welfare as caring for those of mature years who may have been disabled in their employment. To concede that defendant violated the law, and at the same time sustain its contention that the Legislature, which enacted the statute intended to provide a way out for him, does violence to every principle of right and reason.

We do not read the decision in the Kenny and Ide Cases, cited by the learned judge at Special Term, as holding to the contrary. In the case at bar it is the infant who is before the court asserting her right of action, charging that, in employing her to work on this dangerous power press, the defendant did an unlawful thing, and further that, in employing her in a factory without the necessary employment certificate showing consent of her parent or guardian, with the other safeguards as to her health, education, etc. (Labor Law, §§ 71-73), the defendant disregarded the policy of the state and the mandate of the Legislature. In the Kenny Case, supra, deceased was a man of full age, who had been a conductor for the defendant railroad company. After accident resulting in his death, the defendant sought to escape its duty under the Workmen's Compensation Law upon the ground that it was not an "employer," since deceased obtained his employment through false statements, punishable under Penal Law, § 939. It was held that such statements, though a misdemeanor, did not make the contract void, but at most voidable at the election of the employer, which it at no time saw fit to exercise. This followed Hart v. N. Y. C. & H. R. R. R. Co., 205 N. Y. 317, 98 N. E. 493, where the false representations as to the employee's age were not punishable under the Penal Law.

In both these cases the employer had actually received the employee's services while he lived. He first contested such employment with the personal representatives of the deceased after death. In the case at bar the infant herself sues. It is the infant who is here seeking to avoid the contract and pressing its illegality upon the court. The so-called contract in the case at bar was more than voidable. It was contrary to the prohibition of the statute and to the public policy of the state. There was nothing illegal in the employment of Kenny or Hart if the railroad company saw fit to employ them. Kenny, the conductor, was an adult, and Hart, the fireman, while under 21 years of age, was apparently old enough to hire himself out on a steam locomotive. The public had no interest in the matter.

In the case at bar this girl under 16 years of age was incapable of hiring herself out to work in defendant's factory in any capacity without employment or working papers, which would have required the consent of her parents or guardians, and which would have contained the statutory certification or proof that she was physically fit and had received the minimum schooling required by law. In addition, the people of the

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state in their wisdom had absolutely prohibited her from making such a contract, whether her own or her parents' necessities made it desirable or not. The statute declared that she should not be permitted to work upon this power press under any circumstances. These were matters which did not rest with the girl, or her parents, or the defendant.

The case of Ide v. Faul & Timmins (In re U. S. Casualty Co.) 179 App. Div. 567, 166 N. Y. Supp. 858, involved the insurance carrier's objections, where the minor plaintiff had recovered compensation before the state Industrial Commission. Even regarding the contract as voidable, the infant had affirmed it and had received an award. The question of the effect of violations of the Labor Law in employing children under legal age, upon the common-law right of action of such infants, apparently was not considered in either of the cases cited.

The case of Hetzel v. Wasson Piston Ring Co., 89 N. J. Law, 203, 98 Atl. 306, L. R. A. 1917D, 75, has a direct bearing upon the matters here involved. In that case an infant 13 years of age was employed in the factory of the defendant company, in which the manufacture of piston rings and other metallic articles was carried on. Her action was based upon the common-law liability of an employer to compensate an employee for injuries received in his employment by reason of the master's negligence. In the court of first instance the complaint was stricken out upon the ground that the New Jersey Workmen's Act (Laws of 1911, c. 95, as amended) was an exclusive remedy in substitution for the common-law liability of the master, from which order the plaintiff had appealed. After citing the provisions of the Compensation Act, which declared that every contract of hiring made after that act took effect should be presumed to have been made with reference to its provisions, the New Jersey Court of Errors and Appeals said, through Gummere, C. J.:

"It can hardly be doubted that the Legislature, in providing for the ingrafting af these statutory provisions on contracts of hiring, had in mind contracts which were valid in law, or, at least, contracts the making of which was not prohibited by express legislative enactment; for it would be entirely unreasonable to attribute to the Legislature the intention of adding terms to a contract of hiring which it had already prohibited the parties thereto from making. Was, then, the contract in the present case a valid one? A mere reference to chapter 64 of the Laws of 1904 (P. L. p. 152) furnishes a complete answer to this query. This act regulates the age, employment, safety, and work hours of persons employed in factories, workshops, mills, and all places where the manufacture of goods of any kind is carried on, and its first section is that 'no child under the age of fourteen years shall be employed, allowed or permitted to work in any factory, workshop, mill or place where the manufacture of goods of any kind is carried on; any corporation, firm, individual, parent, or guardian of any child shall violate any of the provisions of this section shall be liable to a penalty of $50 for each offense.' The basis of the judgment below is that there was a contract of hiring by which the plaintiff became the employee of the defendant. That there was such a contract, either express or implied, clearly appears from the facts set out in the plaintiff's complaint. That the contract was in violation of this statute, and that the making thereof was absolutely prohibited thereby, cannot be questioned; for it will hardly do to say, as is suggested by counsel, that the employer and the parent of the minor can by joint agreement deprive the child of the protection of this statute by a payment of $50 as a penalty for a violation of its provision. The purpose of the statute cannot be thwarted in any such way. Its primary object is the protection of children who are too young to appreciate the dangers arising out of work in places such as those described in the act. And in order to make that protection complete the Legislature left no loophole for the escape from its provisions of either the employer or the parent. It says to the employer, 'You shall not employ any child

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under the age of 14 years in your factory; you shall not allow or permit him to work there.' It says to the parent of such a child, 'You shall not allow or permit your boy or girl to work in such a place until he or she has reached the age of 14 years.' Having declared this absolute prohibition, how can it logically be said that the Legislature, by a subquent enactment, recognized the right of the factory owner and the parent to disregard the mandate of this statute, and make a contract for the employment of the boy which might or might not have read into it the provisions of the Workmen's Compensation Act, as the master and the parent between them should elect? It is said that there is nothing in the complaint which shows that the contract of hiring was made by the parent on behalf of the plaintiff, and not by the plaintiff himself. It is not necessary that this should appear. ordinarily the parent is entitled to the services of the child, and the wages earned by the child, until he reaches his majority, and so contracts for the employment of the child are presumed to be made by the parent. But in this particular case it is immaterial whether the contract was that of the parent for the child, or of the child by his own act; for the prohibition of the act of 1914 is not only against the making of contracts for the employment of minors under the age of 14 in factories where the manufacture of goods is caried on, but against allowing or permitting him to work in any such factory; and so a contract or hiring, which by its terms proposes to violate that act, is equally invalid, whether made by the parent or by the child. We conclude, therefore that the common-law right of action of the plaintiff, arising out of the facts set out in his complaint, has not at all been affected by the provisions of the Workmen's Compensation Act, and that therefore the judgment under review must be reversed."

The New Jersey act contains a provision not found in the New York statute, by which workmen may elect whether they will accept the benefits of the law. In the case at bar there is no evidence that the parent consented to or was consulted about the employment, because it is alleged that no working papers were required by or filed with the employer. In Robilotto v. Bartholdi Realty Co., 104 Misc. Rep. 419, 172 N. Y. Supp. 328, Mr. Justice McAvoy at Special Term, expressing the opinion that the common-law action survived in a case of unlawful employment of a child, felt constrained to decide contrary to his individual judgment by the decision in Ide v. Faul & Trimmins. If the constitutionality of the Workmen's Compensation Law, in depriving a laborer of his right to trial by jury of his claim for damages against an employer, is sustained because of modern industrial conditions, and upon the theory that employer and employee are presumed to have had the law in mind, "since they voluntarily engage in it [i. e., the employment] as coadventurers, with personal injury to the employee as a probable and foreseen result" (N. Y. Central R. R. Co. v. White, supra), such reasoning does not apply to unlawful and prohibited employment upon a dangerous machine of a child under 16 years of age.

It follows that the order granting defendant's motion for judgment upon the pleadings was erroneous, and that the judgment entered in pursuance of such order should be reversed.

Order granting defendant's motion for judgment upon the pleadings reversed, with costs and disbursements, and motion denied, with $10 costs. The judgment entered upon such order, dismissing the complaint, is reversed, with costs, and the case is remitted to the Supreme Court for trial.

Mills, Putnam, and Jaycox, JJ., concur.

THOMAS, J. (concurring). I concur for reversal upon the ground that upon the facts presented the violation of the statute was the proximate cause of the injury (Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 519), and upon the trial the question of proximate

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cause and damages was for the jury. The question of negligently guarding the machine is inconsistent. The defendant could not become a master, and is liable whether the machine was or was not guarded, if it put the girl to work on it in violation of the statute. I concur with Justice Kelly's discussion and conclusion as to the Compensation Act and its nonapplicability.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

TETRO

v.

SUPERIOR PRINTING & BOX CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—AMOUNT OF COMPENSATION—PARTIAL LOSS OF INDEX FINGER.

Employee, who lost more than fourth of distal phalange of index finger, including portion of bone, is not entitled to award for equivalent of loss of half of index finger in accordance with Workmen's Compensation Law, § 15, subd. 3, to support which, while particle of first phalange need not be lost, substantially all of it must be lost.

(For other cases, see Master and Servant, Dec. Dig. § 385[4].)

Appeal from State Industrial Commission.

Proceeding by Nelson F. Tetro for workmen's compensation, opposed by the Superior Printing & Box Company, employer, and the Fidelity & Casualty Company of New York insurer. From an award of the State Industrial Commission in favor of the claimant, the employer and insurer appeal. Reversed, and claim remitted.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Nadal, Jones & Mowton, of New York City, for appellants.

Merton E. Lewis, Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission.

HENRY T. KELLOGG, J. The claimant was granted an award "for the equivalent loss of one-half of the index finger of the right hand." In an agreement between the claimant and his employer the nature of the injury had been stated to be:

"The top of index finger of right hand that was crushed. The nail taken away and part of the flesh."

The report of the attending physician described it as "absence of part of end of index finger." No testimony was introduced at the hearing, but a discussion then had between the attorneys and the members of the commission discloses that there was a loss of not less than one-quarter and not more than one-half of the phalange of the index finger,

* Decision rendered, November 13, 1918. 172 N. Y. Supp. 722.

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including a portion of the bone thereof. The X-ray photographs forming part of the record show that the loss more approached a one-quarter than a one-half of the distal phalange.

It is a "loss of the first phalange," not of a part thereof, which is made equivalent to the loss of one-half of the finger. Workmen's Compensation Law (Consol. Laws, c. 67) § 15, subd. 3. It is not necessary that every particle of the first phalange be lost. Yet it is necessary to show that "substantially all of the portion of the finger so designated has been lost." Matter of Petrie, 215 N. Y. 335, 109 N. E. 549. A loss of one-quarter of the first phalange is not the loss of the entire phalange. Thompson v. Sherwood Shoe Co., 178 App. Div. 319, 164 N. Y. Supp. 869. The loss under consideration here was but little more than that considered in the Thompson Case. It certainly did not approximate a loss of substantially all of the first phalange, which was made the criterion by the Petrie Case. The award was therefore erroneous.

Award reversed, and claim remitted to the commission for further consideration. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

ETHERTON

v.

JOHNSTOWN KNITTING MILLS CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY DURING SUSPENSION OF WORK.

Had claimant under the Compensation Act suspended work during working hours to go to a cloakroom to change her clothes, or to a washroom to wash or use the toilet, and had been injured while in such room, she could have had an award.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY "IN COURSE OF EMPLOYMENT."

For injured servant to have been acting "in course of employment," entitling her to award under Compensation Act, it was enough if she was performing act ordinarily incident to working day, though directly beneficial to herself, as placing tea on boiler to keep it hot for lunch; that not being forbidden.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

3. MASTER AND SERVANT—RULE OF EMPLOYMENT—ABROGATION BY CUSTOM AND ACQUIESCENCE.

Acquiescence of employer in use of boiler room by employees to heat drinks for lunch was sufficient to abrogate a rule, promulgated long previously, prohibiting such use.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

* Decision rendered, November 13, 1918. 172 N. Y. Supp. 724.

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4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"ARISING OUT OF EMPLOYMENT."

Servant, who placed bottle of tea on boiler in employer's basement to keep it hot for lunch, and while on her way to floor above, slipped and fell at foot of staircase, was injured through an "accident arising out of her employment," within the Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Cochrane, J., dissenting.

Appeal from State Industrial Commission.

Proceeding for compensation for injuries under the Workmen's Compensation Act by Emma Etherton, opposed by the Johnstown Knitting Mills Company, the employer, and the Travelers' Insurance Company, the insurer. From an award of the State Industrial Commission. the employer and insurer appeal. Award affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Amos H. Stephens, of New York City, for appellants.

Merton E. Lewis, Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission.

HENRY T. KELLOGG, J. [1] Claimant was injured during working hours at the plant of her employer. She came to the plant at about 7 a. m., went to the basement, set a bottle of tea on the boiler, and while on he way back to the floor above slipped and fell at the foot of a staircase. If claimant, during working hours, had suspended work to go to a cloakroom to change her clothes, to a washroom to wash up or use the toilet, and while in such room had been injured, she could, under the authorities, have had an award. Chludzinski v. Standard Oil Co., 176 App. Div. 87, 162 N. Y. Supp. 225; Sexton v. Pub. Ser. Com., 180 App. Div. 111, 167 N. Y. Supp. 493; De Filippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761. In order to be acting in the course of her employment, therefore, it was not necessary that she should have been actually engaged in the work thereof. It was sufficient if she was performing some act upon the premises of her employer which, though directly beneficial to herself, was an ordinary incident of a day of employment.

[2-4] This claimant was performing such an act in placing her bottle of tea upon the boiler to keep it hot for a midday meal. Of course, if she had been forbidden to enter the boiler room, she was acting in violation of her duty, and therefore not in the course of her employment. It is true that her employer had long previously promulgated a rule prohibiting the use of the boiler room and the boiler by its employees. However, it was the common practice of employees at the time of the accident to make use of the room as did the claimant. The acquiescence of the employer in this practice was sufficient to abrogate the rule; also, the injuries sustained by claimant arose through an accident arising out of her employment. Injuries due to slipping or tripping on stairs or floors have been held to be due to accidents arising out of the employment. Leslie v. O'Connor, 173 App. Div. 988, 158 N. Y. Supp. 1120, affirming 5 S. D. R. 383; Naro v. Rueckheim Bros., 175 App. Div. 958, 161 N. Y. Supp. 531, affirming 7 S. D. R. 484.

The case of Daly v. Bates & Roberts, 224 N. Y. 126, 120 N. E. 118, in no wise militates against a recovery here, for in that case the claimant, entirely beyond the limits of her working day, was performing labor for herself, and at the time was in no sense an employee. So

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of Manor v. Pennington, 180 App. Div. 130, 167 N. Y. Supp. 424. There the employee, during the noon hour, was injured by an explosion of a boiler in a basement, while eating his dinner; but in that accident the basement was in the possession or occupation of his employer. The Compensation Law (Consol. Laws, c. 67) makes a distinction between injuries received at the plant or upon the premises of the employer, and those received elsewhere. The authorities cited amply justify an award.

The award should be affirmed. All concur, except Cochrane, J., who dissents.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

WARD

v.

ERIE R. CO.*

2. MASTER AND SERVANT — INJURY TO SWITCHMAN—SAFETY APPLIANCES—RIGHT OF ACTION—WORKMEN'S COMPENSATION.

Switchman, whose injuries, sustained while engaged in intrastate commerce, were due to railroad's failure to equip interstate car with safe appliances, in violation of federal Safety Appliance Act of 1903, has no right of action at law against railroad under that act; his only remedy being under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

John M. Kellogg, P. J., dissenting.

Appeal from Trial Term, Chemung County.

Action by Fred D. Ward against the Erie Railroad Company. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed, and complaint dismissed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Stanchfield, Lovell, Flack & Sayles, of Elmira, for appellant.
Mortimer L. Sullivan, of Elmira, for respondent.

HENRY T. KELLOGG, J. [1-3] The plaintiff was a switchman in the railroad yard of the defendant at Elmira. At the time of the accident he was engaged in moving two empty cars, which were neither beginning nor ending a railroad journey, from one track to another in the yard. He was riding the end car, with his foot over the forward end, and was injured through its collision with a third car standing upon a switch track, along which the two cars were being backed. The cars which plaintiff was engaged in moving were intrastate cars. The car with which one of them collided was an interstate car. The injury of the plaintiff was due

* Decision rendered, November 18, 1918. 172 N. Y. Supp. 691.

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to the fact that the interstate car was without a drawhead or end sill, so that the bodies of the cars came together in the collision, smashing the plaintiff's leg. As the plaintiff was engaged in moving intrastate cars merely, he was not employed in the furtherance of interstate commerce, and no liability arose therefrom under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665].) Illinois Central Railway Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163.

Since the plaintiff did not fall within the protection of this act, which regulated interstate commerce, it would seem clear that his only remedy was under the Workmen's Compensation Act of the state of New York (Consol. Laws, c. 67). Nevertheless, the argument is made that the plaintiff had a cause of action under the Federal Safety Appliance Act of 1893 (Act. Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1916, §§ 8605-8612]), as amended by the federal Safety Appliance Act of 1903 (Act Cong. March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. 1916, §§ 8613-8615]). It was shown that the interstate car, with which the car ridden by the plaintiff collided, was not equipped as provided by that act. That the defendant was negligent in reference to the defective car, and that such negligence was the cause of the accident, has support in authority. Texas & Pacific Railway v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874.

However, the federal Safety Appliance Act, while it requires all cars used by railroads engaged in interstate commerce to be equipped in a particular manner, fails to provide that an employee injured through such failure shall have a cause of action. When, therefore, a suitor, as in the case of Texas & Pacific Railway v. Rigsby, supra, brings an action to recover damages for negligence, assigning a violation of the federal Safety Appliance Act as a ground of negligence, he makes use of the common law of one of the states to provide him with a remedy, and uses a federal statute to provide him with a wrong, and without the common law he is as incapable of success, as he is without the statute. It is manifest that the common law of the state is subject to amendment, modification, and withdrawal in any particular which does not offend a constitutional prohibition. This the Workmen's Compensation Law of the state of New York does not so offend has been established. That law abolished the common law of the state in so far as it regulated the liability of employer to employee, and substituted a statutory liability in its place, together with a statutory court for the enforcement of the liability. The plaintiff, therefore, though he may have suffered a wrong, has no remedy by an action at law, for the common law, which might have given it in the particular instance, is nonexistent.

The judgment should be reversed, and the complaint dismissed. All concur, except

JOHN M. KELLOGG, P. J. (dissenting). At the time of, and long before the passage of the so-called Safety Appliance Law, it was the general law that if a statute required a thing to be done which was not done, and the failure to do it caused an injury to another, he may recover his damages from the party in default. The federal statute imposed a penalty of $100 for failure to comply with it. But the act was passed with knowledge of the general law that failure to observe a statutory duty made the company liable for damages resulting therefrom. Congress had in view, not the local law of any state, but this general law, which may be treated as a part of the act. It was unnecessary to state the liability which the general law recognized. Congress well assumed that, if the local law in some particular state did not recognize such liability, the general law, the spirit of which entered into the legislation, would control. Central Vt. Ry. v. White, 238 U. S. 507, 35 Sup. Ct. 865,

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59 L. Ed. 1433, Ann. Cas. 1916B, 252; B. & O. Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

"Again, according to the decisions of this court, it is not open to doubt that the responsibility of a railroad company to its employees, is a matter of general law." B. & O. Ry. v. Baugh, supra, 149 U. S. 374, 375, 13 Sup. Ct. 916, 37 L. Ed. 772.

It cannot be that in passing this law Congress intended that in some localities there should be a liability for damages for a noncompliance with it, and in other localities no liability. It intended to make a uniform law, effective through the United States.

The eight section of the act provides that an employee, injured by a locomotive, car, or train in use contrary to the provisions of the act, shall not be deemed to have assumed the risk, although he continues in the employment after the unlawful use was brought to his knowledge. This section is meaningless, unless Congress intended to permit an injured employee to maintain an action for damages caused by the unlawful act. Clearly a state cannot pass an act providing that continuance in the employment, with knowledge of the defect, shall be an assumption of such risk; neither could it provide that an employee, injured by such violation of the act, shall have no action for damages. Neither can it create some new liability, enforceable outside of the courts, and provide that the action for damages, which the statute clearly contemplated, shall not be available.

I therefore favor an affirmance.

SUPREME COURT OF OKLAHOMA.

CHICAGO, R. I. & P. Ry. Co.

v.

CRONIN. (No. 9730.)*

2. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF MASTER.

Where a servant of a railroad company, while engaged in operating a jack in an effort to raise one of the company's engines, is injured by the excessive weight of a lever of the jack being thrown upon him by reason of a fellow servant, who was assisting him, releasing his lift on the lever without warning, *held*, that the negligence of the fellow servant in releasing his lift and throwing the entire weight on the plaintiff, without notice or warning, was the negligence of the master.

(For other cases, see Master and Servant, Dec. Dig. § 185[22].)

3. MASTER AND SERVANT—INJURY TO SERVANT—MASTER'S LIABILITY—FAILURE TO FURNISH SUFFICIENT MEN.

Where the evidence is such to warrant a reasonable inference that an injury to a servant was the result of a failure of the master to furnish sufficient men to safely operate a certain appliance, a judgment for the servant will be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 163[1].)

* Decision rendered, Dec. 10, 1918. 176 Pac. Rep. 919. Syllabus by the Court.

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Commissioners' Opinion, Division No. 2.

Error from District Court, Grady County; Conn Linn, Judge.

Action by Alex Cronin against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Roberts, C. O. Blake, W. H. Moore, and John E. Du Mars, all of El Reno, for plaintiff in error.

Ledbetter, Stuart & Bell, of Oklahoma City and E. F. Cornels, of Sayre, for defendant in error.

POPE, C. Alex Cronin, while employed as a coach cleaner in the Rock Island roundhouse at Sayre, Okl., was directed to help jack up an engine, and while he and one Walker were engaged in this work, and while exerting their strength in lifting up on the lever of the jack which was being operated to raise said engine, Walker gave down without notice, and the lever came down with a jerk, and Cronin was injured. For this injury Cronin sued the company, and from a judgment in his favor the company brings error.

[1] It is contended that the judgment must be reversed for the reason that the trial court tried the cause as governed by the laws of the state and not the federal Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]); the theory of the company being that Cronin was engaged in interstate commerce because he was working on an engine which, when in service, pulled an interstate passenger train. The engine had been taken out of service and placed in the shop for repairs. It was not being used in commerce of any kind; it was "dead." The fact that the repairs had been made and the engine placed back in service in time to make its regular trip from Sayre, Okl., to Amarillo, Tex., does not necessarily mean that the engine was not out of service in the meantime. We cannot agree with the plaintiff in error that this broken down engine was in interstate commerce at the time of the accident; indeed, it was not in commerce of any kind. It was "dead," undergoing the repairs necessary to placing it in commerce.

[2, 3] The jack which was being used when the accident occurred was a 15-ton jack, and, while there was no evidence that it was not performing the functions which it was intended to perform, there was evidence that a 35-ton jack was properly and consistently used in that particular kind of work. There was evidence that more power was required to operate 15-ton than a 35-ton jack. While two men could raise a locomotive such as the one being raised in this instant with a 35-ton jack, it required more to do the work with a 15-ton jack. There is no dispute that only two men were used to raise the engine in question; there is evidence that Walker let the lever down resulting in the injury to Cronin, because the two men could not lift the engine further.

The law is well settled that the master owes a duty of supplying sufficient help to do the particular work. 3 Labatt, Master & Servant, 2913; Bonn v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 82 S. W. 808; Illinois Cent. R. Co. v. Langan, 116 Ky. 318, 76 S. W. 32; Flike v. Boston & Albany R. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Braun v. Conrad Seipp Brewing Co., 72 Ill. App. 232. Whether the master has furnished sufficient help is ordinarily a question for the jury. 3 Labatt, Master & Servant, 2915; Denver, S. P. & P. R. R. Co. v. Wilson, 12 Colo. 20, 20 Pac. 340; Rosin v. Danaher Lumber Co., 63 Wash. 430, 115 Pac. 833; Supple v. Agnew, 191 Ill. 439, 61 N. E. 392; 6 Thompson on Negligence, 452.

These principles of law considered in cases with the evidence heretofore referred to would justify the jury in concluding the injury was the result of the failure of the master to furnish sufficient help. Another view of the case may be taken; the unquestioned fact is that one of the

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two men engaged in raising a lever released his lift on the lever, thus injuring the other by a heavy weight cast upon him. There are only two theories by which such an accident could be explained. One is the servant was negligent in letting down on the lever without warning his fellow servant; the other is that the weight was too great to be lifted by two men, thus disclosing negligence on the part of the master in failing to furnish sufficient help. It follows that the railroad company was liable, in that, either the injury was the result of direct negligence, or the negligence of a fellow servant.

The judgment of the trial court is therefore affirmed.

PER CURIAM: Adopted in whole.

SUPREME COURT OF OKLAHOMA.

ST. LOUIS, I. M. & S. RY. CO.

v.

TRUE. (No. 8627.)*

1. COMMERCE—ENGAGED IN "INTERSTATE COMMERCE" — FEDERAL EMPLOYERS' LIABILITY ACT.

In an action for damages for personal injuries by an employee against an interstate carrier, the true test of whether the plaintiff was engaged in "interstate commerce," at the time of his injury within the meaning of the federal Employers' Liability Act (U. S. Comp. St. 1916, §§ 8657-8665), is: Was he engaged in interstate transportation or in work so closely related to it as to be practically a part of it?

(For other cases, see Commerce, Dec. Dig. § 27[5].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

2. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—ENGAGED IN INTERSTATE COMMERCE.

Applying this test to the case at bar, the court holds that the work the plaintiff was doing at the time he was injured was too remote from interstate commerce to be practically a part of it.

(For other cases, see Commerce, Dec. Dig. § 27[8].)

Error from District Court, Rogers County; W. J. Campbell, Judge.

Action by H. T. True, Jr., against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. B. Pryor, of Ft. Smith, Ark., and Wm. L. Curtis, of Sallisaw, for plaintiff in error.

F. E. Riddle, of Tulsa, and Wm. Stacey, of Chickasha, for defendant in error.

* Decision rendered, Nov. 19, 1918. Rehearing denied, Dec. 24, 1918. 176 Pac. Rep. 758. Syllabus by the Court.

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KANE, J. This was an action for damages for personal injuries commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below.

Hereafter, for convenience, the parties will be designated "plaintiff" and "defendant" respectively, as they appeared in the trial court. Upon trial to a jury there was a verdict for the plaintiff in the sum $20,000, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The grounds for reversal relied upon by counsel for the defendant, arranged in slightly different order by the court, are summarized in their brief as follows:

(1) Defendant's demurrer to plaintiff's petition was well taken and should have been sustained for the reason that the petition discloses upon its face that the defendant at the time of his alleged injury was engaged in interstate commerce, and that his right to recover for same, if such right existed, was governed by the provisions of the federal Employers' Liability Act (Act. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), and that therefore the laws of the state of Arkansas, upon which the plaintiff's action was based do not apply.

(2) The court erred in admitting in evidence certain sections of the 1911 Session Laws of the state of Arkansas, and in permitting the plaintiff to amend his reply so as to plead section 5 of No. 88 of the 1911 Session Laws of the state of Arkansas.

(3) The court erred in refusing to give instructions numbered 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 requested by the defendant.

(4) The court erred in giving instructions numbered 1, 2, 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 19, and 20 given upon its own motion.

(5) The testimony in the case is not sufficient to, and does not, disclose such a state of facts as show (except as a matter of speculation that the condition of the plaintiff's eyes was approximately the result of the motorcar collision, of which he complains.

(6) The verdict of the jury is excessive and appears to have been given under the influence of passion and prejudice.

The facts necessary to present the principal grounds for reversal, presented for review, may be briefly stated as as follows:

On September 28, 1912, the defendant, was a common carrier, engaged in interstate commerce, one of its lines of railroad running through Lexi and Barton, two towns in the state of Arkansas situated five miles apart. One of the roundhouses of the defendant was located at Lexi, and the men employed therein resided at Barton. At the time the plaintiff was injured, he was in the employ of the defendant as division foreman at this roundhouse; his general duties consisting of directing the labor and superintending the making of all necessary "running repairs" on defendant's engines and cars taken temporarily off the road and sent to the roundhouse for that purpose, which engines and cars were used interchangeably in either interstate or intrastate commerce. The work in the roundhouse required both a night and a day shift of men, and, in addition to plaintiff's general duties, he was required to convey both shifts to and from their work, on a gasoline motorcar. Under the rules of the company, the day shift left the roundhouse at 6 o'clock p. m., and it was plaintiff's duty to be there at that time and convey them in the motor-driven car furnished by the defendant to Barton, and there get the night crew and bring them back to the roundhouse in time for them to go to work at 7 o'clock p. m., after which his duties for the day ended. While plaintiff was nearing Lexi with the night crew on the car, they ran upon a cow lying on the track, which could not be seen, owing to the darkness, and that the alleged negligence of defendant in failing to furnish proper lights for the car, which, on request of plaintiff, defendant had promised but had failed to supply.

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The particular work which the crew was to perform after arriving at Lexi was not shown, except that they were required to do whatever might be found to be done in the roundhouse and yards under the direction of their foreman; and whether they were expected to work on an engine or car used wholly in intrastate commerce, or whether they were to work on an engine or car used wholly in interstate commerce, or whether they would work on implements used both in intrastate and interstate commerce, the evidence does not disclose.

As to the nature and extent of his injuries, the plaintiff alleged, in substance: That immediately after the collision he was taken to a hospital where, among other injuries, it was discovered that a small stone about the size of a grape had been inbedded in his skull; that, although at the time this injury was not regarded as serious, almost immediately after its infliction he commenced to experience severe pains through his head, and especially on the right side thereof passing through his right temple into his right eye; that said pains progressively continued to grow more frequent and more severe until the 9th day of May, 1914, at which time he lost completely and permanently the sight of his right eye; that about ten days thereafter as a result of said pains, which were caused by and were the direct and proximate result of said collision, he lost completely and permanently the sight of his left eye, since which date he has been permanently totally blind. Where the statement of additional facts may be found necessary for the consideration of any particular assignment of errors, they will be made when such assignment is reached for consideration in due order.

The first question presented for review, Was the plaintiff engaged in commerce between the states at the time of his injury, within the meaning of the Employers' Liability Act? has been often under consideration by both the state and federal courts. Whilst the federal Supreme Court has now established an authoritave test for the determination of this question, the application of this test to the varied circumstances of each case is not entirely free from difficulty, as an examination of the authorities will amply disclose. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. In view of this, we will confine our investigation of authorities to the decisions of the Supreme Court of the United States and will examine only such of these as we find helpful in applying the established general rule to our case.

[1, 2] The approved test of employment in such commerce, as stated by the Supreme Court, is:

"Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" Shanks v. Railroad Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

Applying this test, the Supreme Court has held that the requisite employment in interstate commerce exists where a car repairer is replacing a drawbar in a car then in use in such commerce (Wash v. New York, N. H. & H. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. [N. S.] 44); where a fireman is walking ahead of and piloting through switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade (Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172); where a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work (Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153); where a fireman having prepared his engine for a trip is walking across adjacent tracks on a errand consistent with his duties (North Carolina R. Co. v.

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Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159).

And, while not departing from this test, the Supreme Court also has held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars all loaded with intrastate freight from one part of the city to another (Illinois C. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163); where an employee in a colliery operated by the railroad company is mining coal intended to be used in the company's locomotives moving in intrastate commerce (Delaware, L. & W. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397); where the plaintiff is altering the location of a fixture in a machine shop (Shanks v. Delaware, L. & W. Co., supra); where the plaintiff was engaged in transporting coal in a wheelbarrow to defendant's repair shop, where both interstate and intrastate instrumentalities were repaired, for the purpose of heating the shop (Illinois Central R. R. Co. v. Cousins, 241 U. S. 641, 36 Sup. Ct. 446, 60 L. Ed. 1216).

It may be noticed in passing that, in the Cousins Case, the Supreme Court of the state was of the opinion that, inasmuch as the heating of the shop was indispensable to making repairs of any kind, the work Cousins was doing so directly and closely connected with interstate commerce as to form a part of it. The federal Supreme Court, however, in each of these cases, held that the work in which the respective plaintiff was engaged at the time he was injured was too remote from interstate transportation to be practically a part of it. Now applying the test to the case at bar, it seems clear to us that the plaintiff was not engaged in interstate commerce at the time he received his injuries. The precise work he was engaged in was transporting workmen from the place of their residence to the roundhouse of the company. The workmen, it is true, were employed generally for the purpose of making running repairs upon cars and engines used in both interstate and intrastate commerce and were on the way to perform such duties as might be assigned to them under direction of their foreman. But even so, the work which the plaintiff was actually doing, like that of the coal miner in the Yurkonis case, the mechanic in the Shanks Case, and the laborer in the Cousins Case, was to remote from interstate commerce to be practically a part of it.

[3] In connection with this assignment of error, it is also contended for the first time that—

"If there should be any question as to whether or not the plaintiff in this case was engaged in interstate commerce at the time of his injury, the defendant was at least entitled to have had that question submitted to the jury as a question of fact."

Chicago, R. I. & P. Ry. Co. v. Bond, 148 Pac. 103; C., R. I. & P. Co. v. Felder, 155 Pac. 529; P. & N. T. Ry. Co. v. Rosenbloom, 240 U. S. 439, 36 Sup. Ct. 390, 60 L. Ed. 730; and N. Y. C. & H. R. Ry. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298—are cited in support of this proposition. A sufficient answer to this is that the defendant did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce, but raised the question by a demurrer to the petition and a request for a directed verdict, both of which were based upon the ground that it appeared as a matter of law that he was so engaged. As the only ruling requested was properly denied, it is too late to ask this court to review this question, now raised for the first time. L. & N. Ry. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119.

[4] The accident which caused plaintiff's injury occurred in the state of Arkansas, and he bases his right to recovery on a violation by the company of the sections of the 1911 Session Laws of that state, referred to in defendant's next assignment of error. The parts of these sections,

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to wit, sections 2 and 5 of No. 88, necessary to notice, provide in substance as follows:

That every common carrier by railroad shall be liable for all damages to any person suffering injury while he is employed by such carrier, when such injury results in whole or in part by reason of any insufficiency of roadbed and tracks, or structures or machinery and equipment, or lights and signals in switching and terminal yards, or rules and regulations and of number of employees to perform the particular duties with safety to themselves or their coemployees, or any other insufficiency; or by reason of any defect, which defect is due to its negligence, in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves, or other equipment; that if an employee of such common carrier shall receive any injury by reason of any defect in any of its cars, engines, motors, etc., such common carrier shall be deemed to have had knowledge of such defect before and at the time such injury is sustained, and, when the fact of such defect shall be made to appear in the trial of any action against any such common carrier for damages on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such common carrier.

The first contention made by counsel for defendant under this assignment of error is that inasmuch as the evidence conclusively shows that motorcars, such as the one in use at the time of the accident, are designed for use during the daylight hours and are constructed originally without headlights, headlights not being essential for the purpose for which they are designed, it cannot be said that the injury suffered by the plaintiff was caused by a defect in the motorcar, or that the defect was due to the negligence of the company, within the meaning of the statute pleaded.

It is quite true that cars of this class are almost exclusively used during daylight hours, and, of course, when so used a headlight is not an essential part of their equipment and its absence would not constitute a defect in the motorcar. But it seems to us a different rule ought to apply where, as in the case at bar, the defendant takes a motorcar designed for use in daylight only, and requires an employee to use it after dark, without lights, for a purpose for which it was not originally designed. The evidence shows that the plaintiff began the use of this motorcar in August, 1912; that during the month of September the days had grown so short that it was impossible for him to make his return trip with the night shift during daylight; that, realizing the danger of operating the car after dark ,the plaintiff made requisition of the storekeeper for a headlight, which request was refused; that he then, in a personal conversation with Mr. French, the master mechanic and his superior officer, explained the danger and renewed his request that lights be furnished; that Mr. French promised to do his best to have the car equipped with lights and requested plaintiff to continue to operate the car in the meantime without lights. The master mechanic also testified that it was dangerous to operate this car after night without lights. It is true that the same witness testified that the plaintiff was not especially required to operate the car after dark, but this testimony is qualified by his further statement that the plaintiff was required to use the car for the particular work in which he was engaged at the time of the injury, between the hours of 6 and 7 in the morning and 6 and 7 in the evening, and that the plaintiff had no authority to change the time during which he used the car.

In 2 Words and Phrases, 1931, we find that a "defect" may be the result of some inadaptation of an instrumentality to its purposes; and that when machinery was perfect of its kind and in good repair, but unsuitable for the purpose for which it was used, it was a "defect" within the meaning of a statute providing that employers shall be liable for defects, etc. Geloneck v. Dean Steam Pump Co., 165 Mass. 202, 43 N. E. 85. Similarly, we think it may be reasonably said that the plaintiff suffered his injuries by reason of a defect in the motorcar which was created

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by the unsuitableness of the purpose for which it was being used by the company.

As the question raised by the latter part of this assignment of error is not much stressed by counsel in their brief and we are unable to perceive how any substantial right of the defendant could be unjuriously affected by the action of the trial court complained of, even if we assume that it was erroneous, we do not deem it necessary to give it extended notice

[5] The next assignment of error deals with the action of the trial court in refusing to give numerous instructions requested by counsel for the defendant. Many of these requested instructions merely present for review the questions already considered herein, in somewhat different form; whilst others deal with the doctrine of assumed risk and contributory negligence as applicable to causes arising under the federal Employers' Liability Act; others raise the question of the sufficiency of the evidence to show that the loss of eyesight of the plaintiff was the result of the injury received; and others whether the action was commenced within the time prescribed by the two-year statute of limitations; and others the sufficiency of a certain release executed by the plaintiff to relieve the defendant from liability.

Without noticing in detail the requested instructions falling within the first two of the foregoing classes, it is sufficient to say of them that we have examined them all very carefully and are of the opinion that, in so far as they state correct principles of law applicable to the theory of the case at bar, as hereinbefore outlined, they have been substantially covered in the instructions given by the court upon its own motion. This is all that is required.

[6, 7] The most serious question raised presented by this assignment is the sufficiency of the evidence to show that the injuries received by the plaintiff were the cause of his subsequent total loss of sight. Of necessity, opinion evidence was largely resorted to upon this point, and, as usual, there was a sharp conflcit in the testimony of the experts for the respective sides. This evidence as it appears in the record is quite voluminous, and no useful purpose could be served by setting it out in detail in this opinion or commenting on it at any great length. It is sufficient to say of it that we have examined it all very carefully and are satisfied that the finding of the jury in favor of the plaintiff is reasonably sustained by the evidence.

The plaintiff in a civil action is not required to prove his cause beyond any reasonable doubt; if he makes it appear to be more probable that the injury came in whole or in part from the negligence alleged than from any other cause, that is sufficient. St. Louis & S. F. Co. v. Rushing, 31 Okl. 231, 120 Pac. 973; St. Louis & S. F. Co. v. Hart, 45 Okl. 659, 146 Pac. 436.

[8, 9] Instruction No. 22 requested by the defendant and refused by the court relates to the applicability of the two-year statute of limitations. The record shows that the accident occurred on September 28, 1912, and that the action was commenced on the 28th day of September, 1914. The calendar introduced in evidence shows that September 27, 1914, fell on Sunday. Section 5341, Revised Laws 1910, provides:

"The time within which an act is to be done shall be commputed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded."

In view of this statute, it seems quite clear that the action was commenced within two years, and therefore was not barred by the statute of limitations.

[10, 11] Requested instruction No. 23 relates to the sufficiency of the release executed by the plaintiff to exonerate the plaintiff from liability

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The undisputed evidence shows that, after an absence from work of four or five days on account of his injuries, the plaintiff resumed his former employment, without any protest from defendant and without signing a release or a contract of re-employment. After the plaintiff had been at work for about six weeks, the defendant presented a release, which he was required to sign on pain of being discharged from its services. This release recited, in substance, that the plaintiff had received certain injuries, and that, in consideration of re-employment for such time only as may be satisfactory to the company, he releases said company from all claims for damages for said injuries. It is true that there is considerable conflict in the authorities as to whether or not re-employment constitutes sufficient consideration to support a release of this character. Many respectable authorities hold that in the absence of fraud, duress, or mistake, re-employment is a sufficient consideration to support such a contract. But that is not the precise question presented by the facts in the case at bar. Although the release herein was designated a contract of re-employment, it was not so in fact. The plaintiff, as we have seen, had not been discharged from the services of the company, nor had he quit work voluntarily except for a temporary absence of five or six days immediately after the injury, after which he voluntarily returned and continued his work for a period of six weeks before he was required to sign the release. In these circumstances the courts seem quite uniformly to hold that such a contract, not being a contract of re-employment, is void for want of consideration Purdy v. Rome W. & R. Co., 125 N. Y. 209, 26 N. E. 255, Am. St. Rep. 736; M., K. & T. Ry.Co. v. Smith, 98 Tex. 47, 81 S. W. 23, 66 L. R. A. 741, 107 Am. Am. St. 607; Potter v. Detroit, G. H. & M. Ry. Ry. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245.

On the next assignment of error it is only necessary to say that we have examined the instructions given by the court to which counsel made objections, and find that, when they are considered together with all the other instructions given, they state the law applicable to the case with substantial accuracy.

Finding no reversible error in the actions of the trial court hereinbefore considered, and observing nothing in the record indicating that the verdict rendered was induced by passion or prejudice, we are unable to say that it is excessive solely on account of the amount of recovery allowed.

[12] The evidence showed the plaintiff to be a young man, 26 years of age, and an expert mechanic who at the time of his injury was receiving $135 per month. The mortuary table introduced in evidence shows his expectancy of life to be 38 years. During that period he would earn at his then rate of wages alone $68,400. This would be sufficient to support the verdict rendered on a compensatory basis alone. But when, in addition to this, the pain endured by the plaintiff and the inconvenience and humiliation he will necessarly suffer from going through life totally blind is considered, it cannot be said that the verdict returned is excessive.

Section 6005, Revised Laws 1910, provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

And, of the errors assigned of the class mentioned in the statute which we have not specifically noticed it is sufficient to say that, after a careful examination of the entire record, it does not appear to the court that there were any errors of this sort which have probably resulted

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in a misscarriage of justice or which constitute a substantial violation of any constitutional or statutory right of the defendant.

For the reasons stated, the judgment of the court below is affirmed.

All the Justices concur, except Turner, J., who was absent and not participating.

SUPREME COURT OF PENNSYLVANIA.

SMITH

v.

STATE WORKMEN'S INS. FUND.*

1. MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR.

Where a person lets out work to another, and the contractee reserves the control over the work of workmen, the relation of contractor and contractee exists, and not that of master and servant.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT TO COMPENSATION—"INDEPENDENT CONTRACTOR."

One contracting to transfer freight between cars at stipulated price and having control of the method of work and employment and payment of necessary labor, is not an employee, but an "independent contractor" whose widow is not entitled to compensation under Workmen's Compensation Act for his death in the course of such work.

(For other cases, see Master and Seravnt, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.)

Appeal from Court of Common Pleas, Lycoming County.

Jennie V. Smith appeals from the Workmen's Compensation Board's dismissal of appeal from the report of a referee. From a judgment reversing the decision of the Board, the State Workmen's Insurance Fund appeals. Reversed.

Argued before Brown, C. J., and Potter, Stewart, Frazer, and Walling, JJ.

Samuel I Spyker, of Huntingdon, and Francis H. Bohlen, of Philadelphia, for appellant.

Otto G. Kaupp, of Williamsport, for appellee

STEWART, J. The complainant is the widow of John V. Smith, who died at Masten, in this state, the place of his residence, on the 30th of September, 1916, as the result of an accident occurring in the course of his employment a few days prior. At the time of the accident the husband was engaged in transferring freight, including raw hides, in

* Decision rendered, Oct. 7, 1918. 105 Atl. Rep. 90.

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carlroad lots, from standard gauge cars belonging to the Susquehanna & New York Railroad, over whose lines such freight had been transported, to narrow gauge cars for transshipment over a narrow gauge logging road operated by Charles W. Sones, to a station on said road known as Hillsgrove. The accident he sustained, resulting in his death, was the introduction into his system through a superficial external excoriation on his person of anthrax germs latent in the hides handled. The answer filed to the complaint denied that anthrax is an injury as defined in the Workmen's Compensation Act of 1915 Act June 2, 1915 [P. L. 736])—a question which, as we view the case, calls for no discussion here, and we therefore omit any discussion of it—and further, alleged that the deceased husband was not the employee of the party complained against, C. W. Sones, the party owning and operating the narrow gauge road at the time the infection was contracted; the allegation in support of this proposition being that the husband was an independent contractor for the transfer of freight between the broad and narrow gauge roads at the time of the occurrence. The complaint and answer were referred. In the testimony taken before the referee it was developed that the employment of the complainant's husband in the transferring of freight at Masten was the subject of a written contract between himself and C. W. Sones, and that this contract was governing at the time the injury was received. In a written communication signed by Sones addressed to John V. Smith, the husband, under date of 1st of June, 1913, this appears:

"This will confirm our understanding relative to transferring. Our understanding and agreement is that you are to transfer all inbound and outgoing freight in car lots at Masten, with the exception of lumber, from narrow gauge to standard gauge and from standard gauge to narrow gauge cars, all freight received there, at the following prices, namely:

"Bituminous coal at five cents per ton; leather, hides, and oats at twenty-five cents per ton; hair in bales and bark in bags at fifteen cents per ton; boxes and bales at eight cents per ton; empty carboys and empty barrels, one cent each. Lime and Fleshings, 25c.

"Our understanding is that this transferring is to be done in a good and workmanlike manner; leather cars to be loaded in accordance with instructions from the Elk Tanning Company.

"You are to load or unload each standard gauge car within the time limit in order that no demurrage charges may accrue; you are to be responsible for any breakage that may occur while transferring.

"Settlement to be made in cash, on or about the 15th of each month, for the amount transferred during the preceding calendar month.

"This contract to be in full force and effect unless revoked by either party by thirty days' notice in writing.

"Your acceptance of this will be sufficient contract betweens us.

[Signed] C. W. Sones."

Appended to this communication is the following acceptance addressed to said Sones:

"The above is in accordance with understanding we have had in regard to transferring at Masten. I hereby accept the terms and conditions as set forth.

[Signed] John V. Smith."

The finding of the referee was:

"That under and by virtue of the above contract the deceased at various times employed divers persons or laborers who assisted him in the work he had contracted to do in about the said transfer, hiring and discharging such employees, and paying them such wage as might be agreed upon between him and them; that the work of transferring was solely under the charge and care of the said deceased, who was responsible to the defendant for all breakage that might occur in the transferring, and for the demurrage that might arise by reason of any

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delay in loading or unloading from the standard cars; and that he was paid therefor at the rates and in the manner set forth in the above-mentioned contract; his time, manner of working, the number and control of the men being matters entirely within the control of the said John V. Smith."

His legal conclusion was:

"That claimant has not brought herself within the purview of section 307 of the Workmen's Compensation Act of June 2, 1915 (P .L. 736), and her claim must therefore be disallowed, and her claim petition dismissed."

[1, 2] From this disallowance of the claim by the referee an appeal was taken to the Compensation Board, where, after a hearing, the findings and conclusions of the referee were sustained and the appeal dismissed. An appeal followed to the court of common pleas of Lycoming county, two errors being therein assigned, both of law, one directed to the ruling of the referee, sustained by the board, adjudging the deceased husband to have been an independent contractor when his injury for which compensation is provided by the Workmen's Compensation Act. Both assignments were sustained. The decision of the board was reversed, and the compensation claimed was accordingly awarded. From the judgment so entered we have this appeal by the State Workmen's Insurance Fund. The questions raised are the same as were before the court below and there elaborately argued. For the reason heretofore stated, we shall confine the discussion to the single question raised by the first assignment, namely, whether the relation of employer and employee, or, in other words, master and servant, existed between these parties when the injury, the subject of the complaint, was sustained. Except as such relation existed the case admittedly does not fall within the protection of the statute. Inasmuch as we are of one mind that the relation existing between the parties was not that of employer and employee, but that of contractor and contractee, the other question, as to whether the injury complained of is such as the statute contemplates and falls within its provisions, becomes purely academic, and an affirmative conclusion with respect to it would be without result. We therefore dismiss it from consideration.

The remaining question admits of but little discussion. The nature and character of employment of John V. Smith, the claimant's husband, are fixed by the terms of the contract that we have above recited between him and the manager, C. W. Sones. This contract is entirely intelligible, covering the whole case to the minutest detail, omitting nothing that is at all pertinent or that would be helpful to its understanding or application. The chief characteristics of the husband's employment are succinctly asserted in the referee's finding above given. These, together with one other which follows by necessary implication, namely, that by this contract the employer reserved to himself no right in connection with the work to be done, excepting the right to question the sufficiency of the result accomplished, measured by the requirements of the contract, state the whole case. Where this latter feature is of the substance of the contract, it has been uniformly held, and nowhere more strictly and explicitly than in our own state, that the one employed is an independent contractor. The general rule is thus stated: Where a person lets out work to another, the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant (Wood on Master and Servant [2d Ed.] 593; 26 Cyc. 1084), or as stated by Sherman & Redfield on Neg. § 74:

"If one renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is an independent employment."

It is only necessary to cite in further support from among our own cases Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699, Smith v. Simmons,

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103 Pa. 32, 49 Am. Rep. 113, and McColligan v. Penna. R. R. Co., 214 Pa. 229, 63 Atl. 792, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739.

We need not stop to consider any supposed distinction between the terms "employer and employee," and "master and servant." The act of June 2, 1915 (P. L. 736), under which the present claim is preferred, leaves us without occasion to do this, since by express terms the act, in section 103, declares the term "employer," as used in the act to be synonymous with "master," and in section 104 the term "employee" is to be regarded as synonymous with "servant." At the time of the passage of the act the words "master and servant" had a fixed and determined meaning, while the relation of master and servant, and the duties, obligations, and responsibilities arising thereunder, were clearly defined and established. It was in full view of this fact that, without attempting any distinction between the term "employee" and the term "servant," the act declares that for purposes within its provisions the two terms shall be regarded as synonymous. It results from what we have said that the case admits of no other conclusion than that the husband of the claimant was an independent contractor when he sustained the injury from which he died. The case therefore does not fall within the provisions of the Compensation Act of 1915.

The judgment is accordingly reversed.

COURT OF CIVIL APPEALS OF TEXAS.

BEAUMONT.

SHERRILL

v.

UNION LUMBER CO. (No. 390.)*

3. CONTRACTS—WORKMEN'S COMPENSATION ACT—CONTRACTS CONCERNING MEDICAL FEES—VALIDITY.

It was not against public policy, under the Workmen's Compensation Act, pt. 1, § 7 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246k), for an employer to agree to pay a doctor a salary, the employer to retain the medical fees allowed by the insurance association.

(For other cases, see Contracts, Dec. Dig. § 108[2].)

4. CONTRACTS—PARI DELICTO—WORKMEN'S COMPENSATION ACT.

If it is against public policy for an employer to contract to pay a doctor a salary and retain the medical fees allowed by the insurance association under Workmen's Compensation Act, pt. 1, § 7 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246k), physician entering into such a contract is in pari delicto and cannot sue the employer for such fees, having received and retained his salary, since he cannot affirm in part and repudiate in part.

(For other cases, see Contracts, Dec. Dig. § 138[4].)

Appeal from District Court Liberty County; J. Llewellyn, Judge.

Action by E. A. Sherrill against the Union Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

* Decision rendered, Nov. 29, 1918. 207 S. W. Rep. 149.

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E. B. Pickett, Jr., of Liberty, for appellant.

Huggins & Kayser, of Houston, and H. E. Marshall, of Liberty, for appellee.

HIGHTOWER, JR., C. J. We adopt, as substantially correct, the following statement of the nature and result of this suit, as found in the brief of plaintiff in error, and which is concurred in by the defendant in error:

This suit was filed by Dr. E. A. Sherrill, as plaintiff, against the Union Lumber Company, as defendant, for the sum of $1,753, plaintiff claiming that such sum was due him for medical treatment rendered to injured employees of the defendant company during the first week of their injuries, in accordance with the Workmen's Compensation Act of this state. The defendant, Union Lumber Company, operated a sawmil at Milvid, in Liberty county, and on January 1, 1914, the plaintiff entered its employ as a physician for a salary of $150 per month; and in August, 1914, his salary was reduced to $101.50; and on May 1, 1915, another change was made with respect to the cash compensation plaintiff was to receive, and from the last-named date plaintiff was to receive as cash compensation all the medical fees that should be collected by the defendant company from its employees, less $40, it being agreed and understoood between plaintiff and defendant that the latter would collect from every married man on its pay roll $1.75, and from each single man 75 cents.

It was alleged by the plaintiff that when he first entered the defendant's service on January 1, 1914, and when later the amount of salary to be paid him was changed twice, as above stated, his contract and agreement with the defendant further was that said compensation above stated should not include the medical services or treatment which plaintiff might render to employees of defendant during their first week of injuries, and that it was also a part of the agreement and contract between plaintiff and defendant that plaintiff was to be allowed to engage in such other practice, including treatment of injured employees during their first week of injuries, as he might be called upon to perform, and which he would have to attend to; and that, for the medical services and attention which plaintiff might render to any injured employee of defendant during the first week of injury, he was to receive the fee paid therefor by the insurance company with which defendant might be carrying its risk, in accordance with the terms of the Workmen's Compensation Act of this state (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h to 5246zzzz). It was further alleged by plaintiff that, after he would render such medical services to injured employees during their first week of injuries, he would make up a monthly account or statement, and send same to the defendant for the purpose of having defendant collect the sums so due plaintiff from the insurance company which was liable for same, and then to place such collections to the credit of plaintiff on the ledger account which plaintiff had with defendant, and that while that course of dealing was followed the defendant did collect upon such account the sum of $1,753.50, which it refused to pay plaintiff.

The defendant, Union Lumber Company, answered by general denial, and also, by exception and defensive plea, interposed the two-year statute of limitation to all of the items contained in plaintiff's petition for services rendered by plaintiff two years prior to the filing of this suit. The defendant also reconvened against plaintiff for the sum of $429.66, claiming that amount as a balance against plaintiff on account of cash and certain articles of value which defendant had furnished to plaintiff while he was in its employ.

The case was tried with a jury, and was submitted upon one special issue, and, upon the jury's answer thereto, judgment was rendered that plaintiff should take nothing against defendant on his cause of action, and that the defendant should recover on its cross-action against plaintiff

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the sum of $429.66, with legal interest. Plaintiff's motion for new trial having been overruled, a writ of error was prosecuted by him to this court.

[1] The first, second, and third assignments of error are grouped, and treated together, and they all relate to the action of the trial court regarding the one special issue submitted to the jury, and in refusing a special issue instead thereof requested by plaintiff in error. The special issue submitted by the court for the jury's answer was as follows:

"Was it understood or agreed by and between Dr. Sherrill and the Union Lumber Company that he, Dr. Sherrill, should receive the fees due from the insurance company for treatment of injured employees for the first seven days? (Answer Yes or No.)"

In the same connection the court told the jury that the burden of proof was upon the plaintiff to establish the affirmative of the above question by a preponderance of the evidence.

The special issue which plaintiff in error requested the court to submit to the jury was as follows:

"Was it understood and agreed by and between the plaintiff, Dr. E. A. Sherrill, and the defendant, Union Lumber Company, that the monthly compensation plaintiff was to be paid by defendant included the medical treatment or attention which plaintiff rendered to injured employees during the first seven days after injury? (Answer Yes or No.)"

And in this connection the court was asked to instruct the jury that the burden of proof was upon the plaintiff to establish the negative of the above question by a preponderance of the evidence.

Plaintiff in error in due time objected to the form of the issue as submitted by the court to the jury, which objection was overruled, and the action of the court in that respect excepted to, and the action of the court in declining to submit the special issue requested by plaintiff in error was also duly excepted to. The proposition found in plaintiff in error's brief under these assignments is as follows:

"The court's charge should be so framed and expressed as to directly and clearly present the very issue raised by plaintiff's pleadings and having testimony to support it, and it is error to ignore such issue, and to fail to directly and clearly present the same, where the plaintiff has properly requested a special charge thereon."

To the question as submitted by the court to the jury, as above shown, the jury gave a negative answer.

It is contended by plaintiff in error that there is a vast distinction between the issue as submitted by the court and that requested to be submitted by him, and that the issue made by plaintiff in error, according to his pleading and evidence, was not submitted to the jury at all, and also that the issue as submitted by the court really had no dispute in the evidence.

After a very careful consideration of plaintiff in error's pleading, we have reached the conclusion that the special issue as submitted by the court to the jury embraced the very issue tendered by plaintiff in error's pleading, which was, in substance, that it was understood and agreed between plaintiff in error and defendant in error that the compensation which plaintiff in error was to be paid for his services in treating defendant's employees should not include the medical fees which should be paid by the insurance company carrying the risk on defendant in error's employees for services rendered by plaintiff in error to such employees during the first week of injuries to them. Indeed, plaintiff in error's pleading is not susceptible of any other construction. But it is contended by plaintiff in error, also, that the issue as made by his evidence was that there was no understanding or agreement between him and defendant in error to the effect that he should receive or have the fees that should be paid by the insurance company for services performed by him in treating employees during their first week of injuries, but that,

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on the contrary, his evidence was to the effect that he knew that he was entitled to such fees chargeable to the insurance company, as a matter of law, and that no contract or agreement about that matter was required or entered into between him and defendant in error. It is true that plaintiff in error testified on the trial, substantially, that there was no agreement or understanding between him and defendant in error to the effect that he should receive as part compensation the fees to be paid by the insurance company on account of services performed by him in treating injured employees during their first week of injuries; but he also positively testified, in substance, that at the time he entered the employ of defendant in error he was fully aware of the arrangement with reference to such fees that had been made by defendant in error with one Dr. Thomas, who was the physician at the mill, and who was succeeded by plaintiff in error in that capacity; and that under the arrangement and contract between Dr. Thomas and defendant in error he, Dr. Thomas, in addition to the salary paid him by defendant in error, was to receive, and did receive, the fees paid by the insurance company carrying the risks of such employees; and he further testified, substantially, that it was understood and agreed between him and the defendant in error, at the time he entered its employ, that he was to have the same compensation for his services in treating such employees as was had and received by said Dr. Thomas. We are, therefore, of the opinion that plaintiff in error not only substantially alleged, but that, considering his evidence as a whole, he testified, substantially, that there was an agreement and understanding between him and defendant in error that he should have and receive the fees to be paid by the insurance company for services performed by him upon injured employees during the first week of injuries. If we are correct in this, then it follows that the issue submitted by the court to the jury was, in substance, not only the issue as tendered by plaintiff in error's pleading, but was also substantially the issue made by his evidence; and, the jury having determined that that issue should be answered in the negative, they could not consistently have given a negative answer to the question or issue which plaintiff in error requested the court to submit. Indeed, we are of the opinion that while the verbiage and form of the two issues are somewhat different, nevertheless, in substance they are practically the same. It may be that a very astute legal mind might be able to detect a shade of difference between the substance of the two issues, when considered in the light of the pleadings and the evidence, yet this court has been unable to detect such a difference, and we feel sure that ordinary minds, such as are presumed to be possessed by average jurors, would not, and could not, discover any difference between the issue as submitted by the court and that requested by plaintiff in error, and we feel sure that no injury resulted to plaintiff in error from the action of the court in submitting the issue as it did, or in refusing to submit the issue as requested by plaintiff in error.

[2] In support of the proposition of plaintiff in error under these assignments, as above mentioned, a number of cases are cited, commencing with that of Wichita Falls Traction Co. v. Adams, 107 Tex. 612, 183 S. W. 156. In that case it was said, substantially, that in a jury trial, where the case is submitted under a general charge, a party is entitled to an affirmative presentation of an issue raised by the pleading and the evidence upon which he relies. We have no fault to find with the rule there announced, but, on the contrary, believe it to be a sound and just rule, and that it should be applied, not only in jury trials, where a case is submitted upon a general charge, but can see no reason why such rule should not also apply where the case is submitted upon special issues. This same principle was clearly announced by the Supreme Court of this state in Ry. Co. v. McGlamory, 89 Tex. 639, 35 S. W. 1058, and in Ry. Co. v. Shieder, 88 Tex. 166, 30 S. W. 902, 28 L. R. A. 538. There-

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fore, it might be, and it is conceded, that the proposition of plaintiff in error, as above stated, announces a correct rule. But, from what we have said, it does not follow that plaintiff in error's assignments in this connection should be sustained, but, on the contrary that they should be overruled.

By the fourth assignment of error it is complained that the trial court committed error because it refused to peremptorily instruct the jury to find in favor of plaintiff in error for the whole amount sued for by him, less the amount claimed by defendant in error on its plea in reconvention.

[3, 4] This contention is based upon the theory entertained by plaintiff in error that if plaintiff in error and defendant in error in fact entered into an agreement or contract to the effect that the defendant in error should collect and receive the fees to be paid by the insurance company carrying the risks on the latter's employees, and which would otherwise belong to plaintiff in error, under the Workmen's Compensation Act, that then such contract was illegal, null and void, for the reason that it was against public policy, and that defendant in error could not, therefore, invoke the provisions of such contract as a defense to plaintiff in error's right of recovery in this case.

It is the contention of plaintiff in error that the tendency of such contract of agreement, if made—and the jury found, substantially, that it was made—was to trespass upon and injure the rights of workingmen generally, and to lessen the respect for, and confidence in the administration of the Workmen's Compensation law of this state, and that, therefore, such contract urged in defense against plaintiff in error's right to recover the money here sued for should now be declared null and void.

We have not the time to here present at length the argument of the energetic and able counsel of plaintiff in error bearing upon this contention, nor do we deem it necessary, or that it would be at all enlightening, to discuss the many decisions by the appellate courts of this and other states relating to contracts which have held illegal or unenforceable because against sound public policy. No court, so far as we have been able to ascertain, has ever attempted to announce any iron-clad rule by which to determine whether a contract between parties should be held to be illegal or unenforceable on the ground of public policy, and it would be an endless labor to undertake to discuss, or even mention, the numerous cases in which contracts have been denounced or held unenforceable on that ground. In Cyc. vol. 9, p. 481, we find this expression:

"It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law. Where a contract belongs to this class it will be declared void, although in the particular instance no injury to the public may have resulted. In other words, its validity is determined by its general tendency at the time it is made, and, if this is opposed to the interests of the public, it will be invalid, even though the intent of the parties was good, and no injury to the public would result in the particular case. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance."

The Workmen's Compensation Act of this state, which was in effect at the time the contract between the parties to this suit was made, was the act of 1913. Section 7, pt. 1, of that act (Vernon's Sayles' Ann Civ. St. 1914, art. 5246k) provided that "during the first week of the injury the association [insurance company] shall furnish reasonable medical aid, hospital services, and medicines when needed, and if it does not furnish these immediately as and when needed, it shall repay all sums reasonably

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paid or incurred for same, provided reasonable notice of injury shall be given to the said association."

Under the express provisions of that act, the insurance company in this instance would have been due plaintiff in error the amount of fees as claimed by him, and for which he sued the defendant in error, and the defendant in error would be liable to plaintiff in error for the reason that it collected such fees from the insurance company, unless it was understood and agreed between plaintiff in error and defendant in error that such fees should be retained by defendant in error. But if such contract or agreement was against public policy, and therefore unenforceable, and could not be interposed as a defense to this action, and plaintiff in error be considered in a position to raise that question, then plaintiff in error should still be permitted to recover the fees paid by the insurance company to defendant in error, as claimed by him.

Now, it is claimed by plaintiff in error, among other things, that the principle of public policy here invoked by him is very similar to that which prevents a public officer from assigning the fees of his office before the same are earned. The rule which prevents a public officer from making a valid assignment of the fees pertaining to his office before same are earned by the incumbent is undoubtedly firmly established in this state, and was clearly announced by our Supreme Court in the case of National Bank v. Fink, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833; and the rule as there announced has been reaffirmed and followed by the appellate courts of this state in all subsequent cases where the point arose. We cannot concede, however, as is insisted by plaintiff in error we should, that the principle announced in those cases is decisive of the contention here made by plaintiff in error; for we cannot see how any private individual, who may perform services as a physician, can be regarded as a public officer in any sense of the term, merely because he is permitted by law to recover the reasonable value of his services as against one who, by law, is made liable for such services. Therefore we hold that such authorities as are cited by plaintiff in error in support of his contention on this point, including State National Bank v. Fink, supra, and others following that case, are not decisive of the contention here made in his favor. Plaintiff in error has not cited any statute of this state or any rule of the common law which, in our opinion, forbade the making of such a contract as the one in question here; nor has any decision enmanating from any appellate court of this state been cited, nor have we been able to find one, which, in our opinion, supports the contention that the contract here in question, if made, was illegal or unenforceable for reasons of public policy, and in the absence of such a statute of this state, or a rule of the common law, we are not prepared to hold that the contract here in question was in violation of public policy of this state.

As showing the attitude of the judiciary relative to contentions of this character, we quote from Ruling Case Law, vol. 6, p. 710, § 119, as follows:

"Without minimizing the importance of the doctrine that contracts should not be enforced if they contravene public policy, many courts have cautioned against recklessness in condemning contracts as being in violation of public policy. Public policy, some courts have said, is a term of vague and uncertain meaning, which it pertains to the law-making power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Other courts have approved the remark of an English judge, that public policy is an unruly horse, astride of which one may be carried into unknown paths. Considerations such as these have led to the statement that the power of the courts to declare a contract void for being in contravention of sound

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public policy is a very delicate and undefined power, and, like the power to decree a statute unconstitutional, should be exercised only in cases free from doubt. It would seem that by this statement it was not intended to place contracts on the same plane as statutes, for which there is undoubtedly no justification. All that the cautionary remarks may be interpreted to mean is that in determining whether a contract is against public policy there must be kept in view the rule that, where there is no statutory prohibition, the courts do not readily pronounce an agreement invalid on the ground of policy or convenience, but, on the contrary, are inclined to leave men free to regulate their affairs as they think proper. In other words, the courts will not declare a contract void on the ground of public policy unless it clearly appears to be in violation of the public policy of the state. A similar caution is one to the effect that before a court refuses to recognize a contract which is made in good faith, and stipulates for nothing that is malum in se or malum prohibitum, it should be satisfied that the advantage to accrue to the public from its holding is certain and substantial, not theoretical or problematical. I has also been observed that the power to invalidate agreements on the ground of public policy is so far reaching and so easily abused that it should be called into action, to set aside or annul the solemn engagements of parties dealing on equal terms, only in cases where the corrupt or dangerous tendency clearly and unequivocally appears upon the face of the contract itself, or is the necessary inference from the matters which are expressed; and that the only apparent exception to this general rule is to be found in those where the contract, though fair and unobjectionable upon its face, is a part of a corrupt scheme, and is made to disguise the real nature of the transaction. It is no doubt correct to say that, while public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules shall be enforced, and not held invalid on a bare suspicion of illegality. The fact is that, as the courts are reluctant to declare a contract void as against public policy, they will refuse to do so if by any reasonable construction the contract can be upheld."

Many authorities are cited by the author in support of the text.

If, as was substantially found by the jury in this case, the plaintiff in error, upon entering the employ of the defendant in error as a physician at its mill plant, entered into an agreement or understanding with the defendant in error to the effect that plaintiff in error should be paid a certain cash compensation for his service in treating the employees of the millyard, with the further understanding or agreement that plaintiff in error would forbear to claim the fees for which the insurance company in this instance might become liable to plaintiff in error for his services to injured employees during the first week of injuries, under the Workmen's Compensaton Act of this state then in effect, and, further, that such fees might be collected and retained by defendant in error, then we can see no reason for holding that such contract was in violation of the public policy of this state, and we therefore decline to so hold. But if we are wrong in this view of the question, and if the necessary tendency of such contract was vicious and against sound public policy, still there would be a serious question as to whether we ought to sustain plaintiff in error's assignment on this point, for the reason that if the contract was made he was undeniably a party to it, and if the same was vicious, and necessarily tended to injure the public generally, or any class members of the public, or was against the public welfare in any respect, and therefore against sound public policy, then it must be admitted that the plaintiff in error was in pari delicto with the defendant in error in entering into the contract. It seems to us that the plaintiff in error should not be permitted to profit by the contrast to the extent of receiving and retaining the compensation that was allowed him by the defendant in error under its terms, and at the same time repudiate that portion of the

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contract which gave to defendant in error the right to collect and retain the fees paid by the insurance company, and which were held by defendant in error under the terms of the claimed contract. If such contract was made, then it was in virtue of its very terms that plaintiff in error was upon the millyard at all for the purpose of treating defendant in error's employees, and, whatever the contention of plaintiff in error may be in this connection, it is manifest to us that it is solely upon this contract that plaintiff in error relied for recovery, in this case. No other or different cause of action was interposed or suggested by his petition in the case. If it should be held that plaintiff in error can assail this contract in so far as it permitted the defendant in error to have and receive the money to be paid by the insurance company on the ground of public policy, then it would be to hold, in effect, that plaintiff in error might take advantage of a vicious and illegal contract to which he was undeniably a party, in so far as the same was beneficial or favorable to him, and repudiate it in all respects where not so. For this reason alone we would be inclined to overrule the assignment, even if we were of the opinion that the tendencies of the contract were such as to make it against public policy. Edwards County v. Jennings, 89 Tex. 618, 35 S. W. 1053; Ins. Co. v. Pearson, 188 S. W. 513; Reed v. Brewer, 90 Tex. 144, 37 S. W. 418. We think these authorities to some extent at least sustain our views on this point. The fourth assignment is therefore overruled.

[5] By the fifth assignment it is complained that the trial court committed error in overruling plaintiff in error's motion for a new trial, based upon the absence of testimony claimed by him to have been newly discovered.

It is shown by the record that this suit was filed in the distirct court of Liberty county on September 9, 1916, and the trial was commenced on the 13th and concluded on the 15th day of December following. There was attached to the amended motion for new trial an affidavit by one Lattimer, which affidavit was dated December 18, 1916, three days after the trial of this case was concluded. In this affidavit Lattimer stated, among other things, that he was the superintendent of the Union Lumber Company at its mill at Milvid, and that it was he who employed plaintiff in error as a physician for the company at said mill, and that in such contract of employment the agreement between himself and the plaintiff in error, Dr. Sherrill, was that Dr. Sherrill should receive a salary of $150 per month, and in addition to that should receive $30 per month from the Southwestern Hotel Company, and that also, as an extra inducement to Dr. Sherrill, it was further understood and agreed by Lattimer, acting for the Union Lumber Company, and Dr. Sherrill that he, Dr. Sherrill, should receive and have all medical fees to be paid by the insurance company for treating employees at the mill during the first week of injury to them, and that it was upon such understanding and agreement that Dr. Sherrill accepted the position as physician at the mill, and that his employment thereunder began on the 1st day of January, 1914. It is contended by plaintiff in error that these facts stated in the affidavit of Lattimer were in the nature of newly discovered evidence, and that same was highly material, and not cumulative, and that he was not lacking in dilligence to procure such evidence at the trial, and that, therefore, as a matter of right, he was entitled to a new trial, to the end that he might have the benefit of this evidence on the part of Lattimer, and, further, that the trial court abused its discretion in denying the motion for new trial on that ground.

It is stated by the plaintiff in error in his brief that he was compelled to depend upon his own testimony alone for a recovery in this case, and that in all probability the result would be different on another trial if it should be allowed him, and he should have the benefit of the evidence of Lattimer.

It is clear from the record in this case that the plaintiff in error,

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as early as April, 1916, was fully aware of the contention of the defendant in error, to the effect that under his contract of employment with defendant in error the latter was entitled to collect and retain the fees paid by the insurance company hereinbefore mentioned, and that uch contention would be made and insisted upon when this case should proceed to trial in the lower court. Notwithstanding this knowledge on plaintiff in error's part, when the case was reached for trial in the lower court, in December following, no postponement or continuance was requested by him for the purpose of procuring this evidence on the part of Lattimer, but it seems from the record that he announced ready for trial, with full knowledge that he would be dependent upon his own evidence alone as to the character of the contract or agreement between him and defendant in error, and with full knowledge that the defendant in error would dispute and contradict his own evidence touching the nature and extent of this contract.

Now, in the first place, we are not prepared to say that this evidence on the part of Lattimer could be considered "newly discovered" in any sense of the term; because if it be true that plaintiff in error had such an agreement and contract with Lattimer, as the latter states in his affidavits was had, certainly the plaintiff in error, being a party to that contract, was fully aware of its terms, at least substantially so, and we cannot see how it could be contended that such evidence was, in fact, "newly discovered," in the legal sense of that term; but it seems to us, on the contrary, that it must be held that plaintiff in error knew, or had reason to believe, that he could prove these facts by Lattimer at the very time he voluntarily proceeded to trial in this cause. In justice to plaintiff in error, it is proper to say that the record discloses that as early as June, 1913, plaintiff in error commenced efforts to locate Mr. Lattimer, and that he made a number of inquiries as to the whereabouts of Lattimer during the interval between June and shortly prior to the trial below. It seems that Mr. Lattimer, after he severed his connection with the Union Lumber Company at Milvid, which was shortly after plaintiff in error entered its employ, traveled about considerably, and resided or sojourned at different places in this state, as well as at different places in the state of Louisiana; during which period of time, with the exception of one occasion in the city of Houston, Tex., plaintiff in error never saw Lattimer, and did not know his whereabouts, or of his own knowledge how Lattimer might be reached; and it might be conceded that the dilligence used by plaintiff in error and his counsel to ascertain the whereabouts of Lattimer, with a view to having the benefit of his evidence, until a short while prior to the date of the trial in the lower court, was sufficient. But it does not follow from this fact that Lattimer's evidence was newly discovered, nor does it follow that plaintiff in error was not lacking in diligence when he failed to move for a postponement or continuance of the cause, when reached for trial, in order that he may have further time to find Lattimer and have the benefit of his evidence.

Before this court would be authorized to hold that the trial court was in error in denying the motion for new trial in this case, it should be able to say that Lattimer's evidence was, in contemplation of law, newly discovered, and that the same was material, and that plaintiff in error made a clear showing of diligence to procure such evidence, and have the benefit of same on the trial below, and in addition thereto that such evidence was of such a character as would probably cause a different result on another trial.

That such evidence would have been material to plaintiff in error on the trial below cannot be questioned, and, as before stated, it might be conceded that plaintiff in error, from about the 1st of June until a short time before the trial in December, used diligence, which would ordinarily be sufficient, to locate Lattimer and obtain his testimony; but we cannot

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say, in view of this record, that it is probable that Lattimer's evidence, had it been before the jury, would have caused a different result in this case, and we are clearly of the opinion that his evidence cannot be said to have been newly discovered. Under such circumstances, we think it was the clear duty of the plaintiff in error to have moved for a postponement or continuance of his case when the same was called for trial, in order to procure the evidence of Lattimer, and, since it is apparent from the record that no such action was taken by him, we would not be authorized to hold that the court committed error in denying his motion for a new trial.

[6] The rule in this state is that motions for new trial based upon the ground of "newly discovered" evidence, in the proper sense of the term, are addressed to the sound discretion of the trial judge, and, where such motions are denied by him, the appellate court will not reverse the judgment for that reason, unless the latter court can say from the record that the trial court clearly abused the discretion which the law gives him in such matters, and in this instance this court is of the opinion that it would not be authorized to so hold.

In the case of Johnson v. Brown, 65 S. W. 485, the Court of Civil Appeals at San Antonio, speaking through Chief Justice James, held, in substance, that a new trial sought on the ground of newly discovered evidence was properly refused by the trial judge, where the existence of such evidence was known at the time of the trial, but not the whereabouts of the witness, and no continuance or postponement was requested in order that such evidence might be had. We are of opinion that that case is squarely in point on the question here raised, and the holding there meets with our approval. See, also, De Hoyes v. G. H. & S. A. Ry. Co., 52 Tex. Civ. App. 543, 115 S. W. 75.

This disposes of all the assignments of error found in plaintiff in error's brief, and from what we have said above it follows that this court is of the opinion that none of them should be sustained, and that the trial court's judgment should be in all things affirmed; and it will be so ordered.

SUPREME COURT OF TEXAS.

VAUGHAN ET AL.

v.

SOUTHERN SURETY INS. CO. (No. 3065.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BENEFICIARIES—HOW DETERMINED.

Under Workmen's Compensation Act 1913, § 8 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246kk), declaring that compensation shall be paid to legal beneficiaries to be distributed according to the law of descent, the beneficiaries as well as the apportionment must be determined by that law, and not by article 4698, Vernon's Sayles' Ann. Civ. St. 1914, governing recovery of damages for wrongful death.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

* Decision rendered, Dec. 11, 1918. 206 S. W. Rep. 920.

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Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Proceeding for workmen's compensation by F. G. Vaughan and others against the Southwestern Surety Insurance Company, as insurer. From a judgment of the Court of Civil Appeals (195 S. W. 261) in favor of the insurance company, the plaintiffs bring error. Reversed and rendered.

C. W. Howth, F. G. Vaughan, and W. A. Williams, all of Beaumont, for plaintiffs in error.

McDonald Meachum, W. W. Meachum, Jr., Woods, King & John, and Cole & Cole, all of Houston, and McDonald & Wayman, of Galveston, amici curiæ.

Andrews, Streetman, Burns & Logue, of Houston, for defendant in error.

PHILLIPS, C. J. In fixing the compensation to be paid for injury to an employee of a subscribing employer, sustained in the course of his employment and resulting in death, the Workmen's Compensation Act of 1913 (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) omitted any express designation of the beneficiaries entitled to receive the compensation. It merely declared (section 8; art. 5246kk) that it should be paid to "the legal beneficiary" of the deceased employee, with a proviso in the following language:

"Provided, that the compensation herein provided for shall be distributed according to the law providing for the distribution of other property of deceased."

The question here is, how shall the beneficiaries in such cases be determined,—by the law of descent and distribution, or the law governing the recovery of damages for negligent or wrongful injury resulting in death—the death injury statute, Article 4698?

The act was amended in this particular in 1917, Acts 35th Leg. c. 103, § 8a (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—15), by expressly naming the beneficiaries. This case arises under the original act.

[1] The solution of the question is found in the proviso. It says that the compensation shall be distributed "according to the law providing for the distribution of other property of the deceased." Interpretation can add nothing to the clearness of this language. It means the law governing the distribution of the decedent's property, not a law authorizing the recovery of damages by certain kindred as their property. The only law we have regulating the distribution of the property of an intestate decedent is that comprised by our statutes of descent and distribution. That is plainly the law referred to. It is, in effect, made a part of the act.

It is urged, however, that at all events the proviso only means that the compensation shall be apportioned according to that law, and that the beneficiaries among whom it is to be thus allotted are to be ascertained from the death injury statute. The act in no wise relates the subject to that statute by any express provision. If it determines the beneficiaries under the act, it is wholly by implication.

Upon what theory the death injury statute, to the exclusion of another relevant law, is for this purpose by mere implication to be read into the act, we have some difficulty in perceiving. If it be on account of any supposed analogy—and no other ground can well be advanced— it is to be observed that the act, in respect to injuries sustained by those to whom it applies, was intended to entirely supplant that statute as to all actual damages thereunder recoverable. Its purpose was to work in such cases a distinct change in the law. Its provision for the compensation allowed is founded upon a different theory. The compensation itself is determined by another method. Under the death injury statute, actual damages were not recoverable unless pecuniary loss to the plaintiffs was

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shown. Under the act, the compensation allowed the beneficiaries entitled is absolute, regardless of whether they have sustained any such loss.

With the entire scheme of the death injury statute in its application to all such cases thus entirely abandoned, in the absence of any express provision the reasonable presumption is that the Legislature did not intend it to govern the operation of the act in any particular. Certainly it should not, by mere implication, control its operation in this particular, as against a law to which the subject is by the act expressly related.

If the contrary be held and the beneficiaries be thus determined, no rule would be afforded for the apportionment of the compensation. The death injury statute is silent on the subject. All damages recoverable under it must be allotted by a court or jury. The law of descent and distribution, in such event, would have to be consulted for the apportionment, since the act, except in its reference to that law, makes no provision in that regard. Under such construction, the operation of the act would, in this one particular, be related to two other distinct laws, one for determining the persons entitled to the compensation, and another the proportion of their respective shares. Under the terms of the act such a purpose is not to be imputed to the Legislature in its adoption.

Apart from these considerations, this construction denies to the language of the proviso its natural effect. Its plain requirement is that the compensation shall be distributed according to the law of descent and distribution. The clause contains no qualifying expression, and no limitation upon the full operation of such law is imposed. It therefore means that the distribution shall be in all respects in accordance with that law. A distribution could not be made "according to" that law unless the law were given full effect—not merely a part of it, but all of it. Giving it such effect, it necessarily determines not only the apportionment, but the persons entitled to the property.

[2] In the face of the plain provision of the act we are not at liberty to speculate upon the intention of the Legislature in its enactment. Nor is it necessary that we attempt to reconcile any inconsistencies that its operation may entail. The wisdom of the act is not a judicial question. The argument that it may allow certain kindred of the deceased employee to share in the compensation who were denied any right of action under another statute, cannot prevail over its express terms. It may in this respect operate unfairly, but that was for the determination of the Legislature. As is said by a competent authority, the remedy for a harsh law is not judicial interpretation, but its amendment or repeal.

The judgments of the District Court and Court of Civil Appeals are reversed, and since the case is here upon an agreed statement, judgment will be rendered for the plaintiffs in error for the amount stipulated in the statement with legal interest.

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SUPREME COURT OF WISCONSIN.

ANDERSON

v.

MILLER SCRAP IRON CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LIABILITY.

The Workmen's Compensation Act has substituted another liability in the place of the employer's common-law liability in tort; but it does not necessarily follow that the principles applicable to torts should be applied to this new liability.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES OCCURRING OUTSIDE THE STATE.

That Workmen's Compensation Act, § 2394—1, abolishes certain common-law defenses "within the state," and that the act is made applicable to minors legally employed under the "laws of this state," does not, in view of the unqualified language of section 2394—3, show an intention to limit the act to injuries occurring within the state.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION—INJURIES WITHOUT THE STATE.

The Workmen's Compensation Act is so far a part of every contract of employment that the rights and liabilities of the parties thereto, in case of injury to the employee, must be determined in accordance with its provision whether such injury occur within or without the state.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

Appeal from Municipal Court of Brown County; N. J. Monahan, Judge.

Action by Katherine Anderson, as administratrix of the estate of Joseph Boncher, deceased, against the Miller Scrap Iron Company and another. Judgment for plaintiff, and defendants appeal. Judgment reversed, and cause remanded.

Personal injury. The defendant company is a Wisconsin corporation, having its principal place of business at Green Bay. Joseph Boncher was a resident of Wisconsin, an employee of the defendant company. The business of the company, a dealer in scrap iron and steel, was carried on almost entirely within the state of Wisconsin. Nearly all of Boncher's services had been rendered within the state. Prior to the time of the accident, which occurred on June 30, 1917, the company had purchased the scrap on a small piece of narrow gauge railroad near Gibb's farm, a place about 10 miles from Iron River, Mich. The work of gathering this scrap was under the personal direction of the defendant Herman Miller. The employees of the company boarded at Iron River, and went to and from their work in an automobile. On the second day, as they were going to work, the automobile, which was being driven by Herman Miller,

* Decision rendered, Jan. 7, 1919. 170 N. W. Rep. 275.

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was overturned, and Boncher suffered injuries from which he afterwards died. The action is brought by the administratrix of his estate to recover damages for the injuries sustained by Boncher and for his death. The liability of the defendants is predicated upon the survival statute of the state of Michigan. There was a verdict in favor of the plaintiff, finding the defendants guilty of negligence, and judgment was entered thereon for $4,116.59 damages and costs, from which judgment the defendants appeal. Other material facts will be stated in the opinion.

Richmond, Jackman, Wilkie & Toebaas, of Madison, for appellant Miller Scrap Iron Co.

Kittell, Joseph & Redfield, of Green Bay, for appellant Miller.

Kaftan & Reynolds, of Green Bay, for respondent.

Peter Fisher, of Kenosha, and Worth E. Caylor, of Chicago, Ill., amici curiæ.

ROSENBERRY, J. (after stating the facts as above). The plaintiff claims the right to recover damages under the laws of the state of Michigan for the injury and death of Boncher, on the ground that the defendant company and its agent, Herman Miller, were negligent. The defendants claim that the liability of the defendant company is that prescribed by the Workmen's Compensation Act of Wisconsin (St. 1917, §§ 2394—1 to 2394—95), and inasmuch as the plaintiff has requested that, in the event it is held that the Workmen's Compensation Act applies to the company, the judgment shall be reversed as to both defendants, we will first consider that question.

The plaintiff's contention is that the injuries to the deceased, Boncher, having occurred within the state of Michigan, the rights, and liabilities of the parties must be determined in accordance with the law of the state of Michigan; that the Workmen's Compensation Act of the state of Wisconsin cannot affect the rights, duties, and liabilities of the defendant company, because such act can have no extraterritorial effect. On behalf of the defendant company it is claimed that, this being an action in a Wisconsin court, both parties to which reside within the state of Wisconsin, and the contract of employment having been made within this state, at least in the courts of this state, the rights, duties, and liabilities of the defendant company are those prescribed by the Workmen's Compensation Act.

Prior to the enactment of the Workmen's Compensation Act the liability of the employer was that prescribed by the common law, as modified by statute. The liability was held not to be one ex contractu, but one ex délicto, and the liability was held to result from the wrong which followed from the failure of the employer to discharge the duty which he owed to his employee to observe that degree of care which the law required of him. An action to enforce a claim against the employer for violation of his duty was therefore an action ex delicto, and the principles governing tort actions were applied. An action for personal injuries, being in its nature transitory, might be brought in any court having jurisdiction of the parties; but, wherever brought, the rights and liabilities of the parties were determined by the law of the place where the injury occurred. Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859. The injuries sustained by the deceased, Boncher, having resulted from an accident which happened in Michigan, the plaintiff claims the benefit of this established principle of law, and seeks to enforce the liability of the defendants therefor in accordance with the laws of the state of Michigan, and such would be the plaintiff's undoubted right, but for the Wisconsin Workmen's Compensation Act.

[1] It is claimed that the scheme of compensation provided by the Workmen's Compensation Act is a substitute for the common-law liability

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of the employer, and that it should therefore be administered in accordance with the principles applicable to the law of torts. In Borginis v. Falk Co., 147 Wis. 327, 365, 133 N. W. 209, 37 L. R. A. (N. S.) 489, language was used arguendo which, taken apart from its context, may lend colorable support to this theory; but, when the whole opinion is considered, it cannot be fairly said that it does so. The matter there under consideration was whether or not the Legislature could change a remedy for a tort, and it was held that it might do so. That is not equivalent to holding that the liability imposed by the act is tortious in its nature.

It is true that the liability of the employer at common law was that of a wrongdoer, and therefore tortious in its nature. It is also true that for that liability the Workmen's Compensation Act has substituted another liability. It does not necessarily follow, however, that the principles applicable to torts should be applied to the liabilities of the employer under the act. The liability of the employer under the act is not based upon any wrongful conduct or negligent act of the employer. However blameless the employer may be, he is nevertheless liable if the employee be injured and he bring himself within the terms of the act.

The liability of the employer under the Workmen's Compensation Act is not only one of an entirely different nature, but it is based upon a wholly different economic theory. The clear intent and purpose of the Workmen's Compensation Act is to burden a particular industry in which the injury to an employee occurs with the damages resulting from such injury and to secure to the injured employee as large a part of the financial burden imposed by the act upon the industry as is possible. The law is therefore administered by state agencies for the benefit of the injured employee. He has the benefit of legal advice, often without expense, and where expense is incurred it is limited by the terms of the law.

Naturally such a radical change in our laws was necessarily followed by a period of adjustment. It ought to be clear to every one at this time, however, and particularly to the legal profession, that along with the practical abolition of the tortious liability of the employer there went an abolition of the refinements and technicalities whch grew up in the administration of the law relating to personal injuries. It was the duty of the Legislature to determine what economic policy was in the interest of the general welfare. The Legislature having made that determination, it is the duty of the courts so to administer the law within constitutional limitations as to give full effect to the legislative purpose. Many cases have been brought here because counsel have failed fully to grasp the meaning of this fundamental change in an important field of the law.

[2] To what injuries did the Legislature intend that the Workmen's Compensation Act should apply? It is claimed that by the language of section 2394—1, Stats., which provides that "in any section to recover damages for a personal injury sutained *within this state*" it shall not be a defense that the employee assumed the risk, that the injury was caused by want of ordinary care on the part of a fellow servant, or that the employee was guilty of contributory negligence, the act is expressly limited to injuries occurring within the state.

Manifestly the state of Wisconsin cannot prescribe the liability of employers for purely tortious injuries to employees occurring without the state of Wisconsin, because, as we have seen, the liability in such a case is that prescribed by the law of the place where the injury occurs. The effect of that part of the act, therefore, abolishing the common-law defenses against claims for personal injuries based upon negligence, is necessarily limited in its application to the state of Wisconsin, and the section would have meant the same thing that it now means, had the words "in this state" been omitted.

Section 2394—3, Stats. which provides that "liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally

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sustained by his employee, and for his death," where the prescribed conditions of compensation concur, and that the right to recover the compensation provided in the act "shall be the exclusive remedy against the employer for such injury or death," and that in all other cases the liability of the employer shall be that at common law except that he may not avail himself of the common-law defenses of assumption of hazard, negligence of a fellow servant, or contributory negligence, contains no language from which it may be inferred that its application was intended to be limited to injuries which occur within the state.

The fact that that part of the act which abolishes the three common-law defenses named contains language limiting it to the state, and that such language is not used in that part of the act imposing the statutory liability upon employers, is at least significant and we think persuasive.

It is further argued that, because there is language used to the effect that it shall apply to minors who are legally permitted to work under the laws of this state, that where injury is caused by failure of the employer to comply with any statute of the state the compensation shall be increased by 15 per cent., and that the Industrial Commission is given supervision of every place of employment and public building in this state, the application of the act is thereby limited, so far as it prescribed the liability of the employer to compensation for injuries occurring within this state.

We do not think this a fair inference to be drawn from the language of the sections referred to. In the sections referred to, the powers conferred and the duties and liabilities prescribed are by their very nature limited to the state. The Legislature had no power to require safeguards, legally to authorize the employment of minors, or to regulate or supervise places of employment or public buildings without the state. The fact that the laws relating to the employment of minors, the safeguarding of machinery, and the supervision of places of employment and public buildings are to be considered in determining the liability of employers does not limit the application of the act, but relates solely to particular classes of injuries, and confers special powers upon the Industrial Commission.

The language of the act does not, either by express terms or by necessary implication, limit its application to injuries which are received within the territorial limits of the state. The legislative intent may be ascertained by a consideration of the Legislative purpose in its adoption.

It must be borne in mind in the consideration of this whole subject that the liability of the employer under the Compensation Act is not limited to those injuries sustained by the employee by reason of the employer's negligence. The liability of the employer under the Compensation Act is not based upon the employer's neglect of duty, and is therefore not tortious. Neither is it contractual in the ordinary sense in which that term is used. It is true that the liability imposed by the act grows out of and is incidental to a relationship based upon contract; but that does not make it contractual, any more than it made the liability of the employer at common law contractual, for that, too, was a liability which grew out of and was incidental to a like relationship. If, as is said in some cases (State v. District Court, 139 Minn. 205, 166 N. W. 185), the liability of the employer under the law is a contract obligation, then the rights and liabilities of the parties would always be referable to the law in force at the time the contract of employment was entered into. Such is not the case. Borgnis v. Falk, 147 Wis. 327, 366, 133 N. W. 209, 37 L. R. A. (N. S.) 489. Neither, in our opinion, does the fact that the law has an elective feature and is not compulsory materially affect the question, notwithstanding it has been held otherwise. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436. In the case last cited it is said:

"Acceptance of the act, whether made expressly or impliedly, as permitted by the act, made its provisions a part of these contracts of employment."

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And other language to the same effect is used. If this be true, the law is not subject to amendment as against existing contracts in any respect which would impair the contract, within the meaning of that term as used in the Constitution. Such construction is to be avoided in the interest of a simple and correct administration of the law, and should not be adopted unless the clearly expressed legislative intent excludes other construction.

[3] The liability of the employer under the act is not tortious, and is not contractual in the sense that it should be considered as a covenant or part of the contract; but it is purely statutory. An employer cannot relieve himself of liability under the law by contract. Having entered into a contract of employment with his employee, he cannot by contract change either the conditions or the rate of compensation for which he will be liable in case the employee is injured. He may elect not to come under the law, but, when he does elect to come under it, his liabilities are not subject to modification by contract between himself and his employee. It is the law, not the contract, which prescribes the conditions and the rate of compensation. Under the provisions of our act he may withdraw; by so doing he does not alter either the law or the contract. If his withdrawal altered the contract, it would require the consent of the other party to the contract. An employer who has elected to come under or to remain under the law, as the case may be, does not have a different liabilty under the terms of the act than he would have, were it by its terms compulsory.

In deference to supposed constitutional barriers, many laws in recent years have been brought in by the back door so to speak; but they are nevertheless the law of the land, and it is not necessary for them to have the sanction of individual contract to vitalize them. The right of free contract has been limited in recent years by legislative enactment in many important particulars in the interest of the general welfare, and comparatively recent decisions of the United States Supreme Court have so broadened the constitutional field that it may be fairly said we are at the beginning of a new era. The determination of the relative merits of different economic theories, both in the field of taxation and in that of social reform, will in the light of these decisions be more and more a matter of legislative decision, and less and less questions for judicial consideration.

The liability of the employer under the act being statutory, the act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract. Every contract is enforced and interpreted in accordance with the law of the place where it is made, and the rights and liabilities of the parties thereto are to be determined in accordance with that law. Just as the law of negotiable instruments is a part of every promissory note, to the extent that the rights and liabilities of the parties thereto must be determined with reference to the law of the place where the promisory note is made, executed, and delivered, so the rights and liabilities of every employer and employee who enter into a contract of employment within this state must be determined with reference to the Workmen's Compensation Act. 6 R. C. L. 655; International Harvester Co. v. McAdam, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614.

By the law of this state, when an employer enters into a contract with an employee, both being within its terms, in the event of injury to the employee, the employer becomes liable therefor in the manner and to the extent prescribed by the Workmen's Compensation Act, and he has no other or different liability. The right of the employee to recover the compensation provided for by the act is exclusive of all other remedies against the employer for any injury which the employee may sustain,

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and in the event of his death the same limitation applies to his personal representatives.

Will the rights and liabilities of the parties to the contract of employment, as defined and prescribed by the laws of this state, govern if the injury occur without the state? It is obvious that the Workmen's Compensation Act ex propria vigore can have no extraterritorial effect. 12 Corpus Juries, 434, and cases cited.

We do not consider in this case, because it is neither argued nor necessary to the decision, whether the Workmen's Compensation Law of this state should be enforced by the courts of Michigan, under the facts and circumstances in this case. Neither do we consider whether or not, were the facts and circumstances reversed, we should enforce a like law of a sister state. In this case both parties to the contract of employment were residents of this state; they were incidentally without the state in the prosecution of the employer's business. The contract of employment was made within this state, and the action is brought in the courts of this state, and the question is whether or not, in this case, the rights and liabilities of the parties should be determined in accordance with the Workmen's Compensation Act or in accordance with the law of the state of Michigan, where the injuries occurred.

As has been said, the Workmen's Compensation Act is based upon the economic theory that it is in the interest of the general welfare that damages arising from injuries sustained by persons engaged in a particular industry shall be borne by that industry. The liabilty of the employer at common law was limited to cases where negligence could be established. Where negligence was established, the burden was borne in the first instance by the employer, who ordinarily had an opportuntiy to pass all or a part of the burden on. In cases where negligence could not be established, the injured employee bore the entire burden, with no opportunity to pass it on. Under the Workmen's Compensation Act the burden falls upon society at large, and is not borne entirely either by the employer or by the employee. If the application of the law be limited to injuries occurring within this state, then in the case of injuries sustained without the state the employer will not be liable, except he be negligent, and where he is not negligent the whole loss must be borne by the employee, and the whole legislative purpose is, as to injuries sustained without the state defeated. We have extensive borders; thousands of employees are passing out of and into Wisconsin daily and almost hourly, in the discharge of their ordinary duties. Can it be that the Legislature intended that every time these employees crossed the state line their right to compensation for injuries incidental to and growing out of their employment should be changed, and that as to injuries which occur beyond the state line the old system, instead of the new, should apply?

In Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, it has been held that a somewhat similar law of Massachusetts did not apply to injuries sustained without the state. There is language in the act construed in that case which sustains that decision, and throughout the opinion of the court it appears that the application of the act there considered is limited by the fact that—

"One main purpose of the act is to establish between employee and employer, in place of the common-law or statutory remedy for personal injury, which is based upon a tort, a system whereby compensation for all personal injuries or death of the employee received in the course of and arising out of his employment, whether through unavoidable accident or negligence or otherwise (except through his serious and willful mistake), shall be determined forthwith by a public board, and paid by the insurer."

If the liability of the employer under the Workmen's Compensation Act is considered simply as a substitute for the common-law liability of

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the employer, it is logical to hold that the principles governing the law of torts should be applied to the Workmen's Compensation Act.

We do not regard the liability of the employer under the Workmen's Compensation Act merely as a substitute for the common-law liability of the employer. The liability of the employer under the Compensation Act rests upon an entirely different basis than that of his liability at common law. In the one case his liability is predicated upon the principle that every one who does a wrong resulting in injury to another shall be liable for the damages resulting therefrom. In the other case injuries to employees are regarded as necessarily incidental to the conduct of industry under modern conditions, and not the result of a wrong committed by the employer, and that therefore the damages arising therefrom should be borne by the whole industry, rather than by the employer or employee. We therefore hold that the principles which are applicable to actions ex delicto should not be applied to claims arising under the Workmen's Compensation Act, but rather that the law should be so construed and applied as to carry out and effectuate the legislative purpose. It was thought by the Massachusetts court that, if the law were held applicable to injuries arising without the state, great difficulties in its administration would be encountered. But these difficulties do not appear to us to be any greater under one construction than under another. Even if it be held (a matter which is not decided here) that the employee sustaining injuries without the state must proceed in the manner prescribed by the act, it is quite as advantageous to him, compensation being certain, as the right to conduct long and expensive litigation in the courts of this or other states, with the possibility of receiving nothing in the end.

The Workmen's Compensation Act of Wisconsin is so far a part of every contract of employment that the rights and liabilities of the parties thereto in case of injury to the employee, both being subject to it, must be determined in accordance with its provisions, whether such injuries occur without the state. The act is controlling as to the rights and liabilities of the parties to the contract, whether the contract of employment is valid. The statutory liability of the employer is exclusive of all other liability of the employer, where both parties are under the act.

If the Workmen's Compensation Acts of the several states are to be given effect, so as to make them general in their application, they must be held to apply to injuries to employees wherever they occur. If accidents occurring without the state are to be in one class, and accidents occurring within the state are to be in another class, every state might have a Workmen's Compensation Act, and yet both the old and the new systems would still be in force, and the legislative purpose would not be accomplished. The construction here placed upon the act will give the legislative intent full effect, and, if recognized by the courts of sister states, will give every employee the remedy provided by the Workmen's Compensation Act under which his contract of employment was made. In addition to the cases hereinbefore referred to, we cite the following: Industrial Commission of Colorado v. Insurance Company (Colo.) 174 Pac. 589; Grinnell v. Wilkinson, 39 R. I. 447, 98 Atl. 103, L. R. A. 1917B, 767, Ann. Cas. 1918B, 618; Gooding v. Ott, 77 W. Va. 487, 87 S. E. 862, L. R. A. 1916D, 637.

Both defendants having appealed, and the plaintiff having requested, in the event the law be held applicable to the defendant company, that judgment be reversed as to both defendants, we will not consider the other questions raised in appellants' brief.

Judgment reversed, and cause remanded for further proceedings according to law; the defendants to tax but one bill of costs.

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SUPREME COURT OF WISCONSIN.

F. EGGERS VENEER SEATING CO. ET AL.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—EVIDENCE—REPORTS BY EMPLOYER.

A report of an accident pursuant to the rules of practice of the Industrial Commission is competent evidence in proceeding for workmen's compensation.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —CAUSE OF ACCIDENT—EVIDENCE.

Statement, in employer's report of accident to Industrial Commission, that elevator operator lost control of car, which fell, and that an employee was in the car, and was injured, makes prima facie case in favor of the injured employee, seeking compensation.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

St. 1917, § 2394—16 providing that the commission may issue subpœnas, compel production of books, etc., and take testimony, contemplates that the Industrial Commission may require a report from the employer of accidents.

(For other cases, see Master and Servant, Dec. Dig. § 397½.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —CAUSE OF ACCIDENT—EVIDENCE.

Testimony of physician that the workman told him, about an hour after the accident, that the fall of the elevator hurt him, and that he concluded from an examination that such fall was the primary cause of the injury, is sufficient to support a conclusion that the injury was proximately caused by the accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —EVIDENCE.

Employers' objection that report of accident, which it had made, was not formally offered in evidence before the Industrial Commission, is not well taken, since the employer is fully aware of the contents of the report.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PROCEEDINGS—TIME FOR OBJECTION.

If the report of the employer concerning the accident is incorrect, the employer should call the error to the attention of the commission upon the hearing.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

* Decision rendered, Jan. 7, 1919. 170 N. W. Rep. 280.

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7. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PROCEEDINGS.

Proceedings before the Industrial Commission for workmen's compensation are not to be hampered by useless formalities or technicalities.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceedings by Hermeline Lesperance for workmen's compensation for the death of her husband, John Lesperance, opposed by the F. Eggers Veneer Seating Company, employer, and the Wisconsin Employers' Exchange. From a judgment of the circuit court, affirming an award of the Industrial Commission in favor of claimant, the employer and the Employers' Exchange appeal. Affirmed.

This action was brought by the plaintiffs to set aside an award of the Industrial Commission by which Hermeline Lesperance was awarded $2,016 as compensation for the death of her husband from injuries which it is alleged he suffered while in plaintiffs' employ and which arose out of and were incident to his employment.

It is claimed that John Lesperance, a man 72 year of age, who had been suffering from rupture for 7 years, was injured when an elevator belonging to the plaintiffs dropped some distance, producing a rupture of the small intestine, which resulted in his death on the following day. The plaintiffs claim that the evidence shows that the elevator did not drop, as is alleged by the defendants, and that Lesperance had been wearing an improperly fitting truss, which was the proximate cause of the ruptured intestine.

The Industrial Commission found that John Lesperance, while performing service growing out of and incidental to his employment, accidentally sustained the alleged personal injuries which resulted in his death, and awarded to the widow, Hermeline Lesperance, the sum of $2,016.

The circuit court found that the commission's award is sustained by evidence to the effect that the elevator on which decedent was riding did not operate properly, and held that—

"The fact that the decedent would not have been hurt very badly if he had not been ruptured before the accident, or if he had a properly fitting truss, does not change the situation. Neither negligence in wearing an improperly fitting truss or predisposition to injury affect the right to claim compensation under the Workmen's Compensation Act [St. 1917, § 2394—1 et seq.]."

Judgment was entered sustaining the award of the Industrial Commission, from which judgment the plaintiffs appeal.

Otjen & Otjen, of Milwaukee, for appellants.

Spencer Haven, Atty. Gen., Windfield W. Gilman, Asst. Atty. Gen., and F. W. Dicke, of Two Rivers, for respondents.

SIEBECKER, J. (after stating the facts as above). The appellants insist that the evidence does not support an award for the reason that the alleged falling of the elevator was not the proximate cause of Lesperance's death. The claim is made that it conclusively appears that his death was solely caused by the defective truss he wore at the time he was riding in the elevator, and hence his injury is not attributable to the fall of the elevator, and it cannot be said to be the natural consequence

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thereof. This position of appellants is based on the ground that the statements of Dr. Gates of what Lesperance told him concerning the history of his ailment and the relation of the accident to his injury and the admission of the employer in its report of the accident to the Industrial Commission are not competent as evidence to sustain an award.

[1-3] The employer made and filed a report of the accident, pursuant to the rules of practice of the Industrial Commission (rule 2), stating that the elevator operator lost control of the car and that it dropped to the bottom; that Lesperance was in the car and was injured. The contents of this report are competent and establish a prima facie case. First National Bank of Milwaukee v. Industrial Commission, 161 Wis. 526, 154 N. W. 847. The provision of section 2394—16, Stats., clearly contemplates that the commission may cause the facts pertaining to industrial accidents to be ascertained by them in this manner and may be considered by them on final hearing.

[4] The evidence of the attending doctor is, in substance, that the deceased informed him, when he was called to his attendance within about an hour after the alleged accident, that the drop of the elevator hurt him, and that when he examined the injured intestine and the imperfect truss he concluded that the shock caused by the drop of the elevator was the primary cause of the injury to the intestine. This evidence is of such substantial character that a reasonable conclusion can be drawn therefrom that the injury was proximately caused by the accident. Such evidence was held to be proper proof on the subject in Wright v. Kerrigan, [1911] 2 Irish Reports, 301; Bank v. Ind. Com., supra.

[5-7] The objection that the employer's report of the accident was not formally offered in evidence is not well taken. The employer was fully aware of the contents of this report. If any corrections thereof were deemed necessary, they should have been brought to the attention of the commissioners upon the hearing. The proceedings before the commission are not be hampered by useless formalities nor technicalities. Anderson v. Miller, S. I. Co. (decided Jan. 7, 1919) 170 N. W. 275; Mary Carroll's Case, 225 Mass. 203, 114 N. E. 285; 1 Bul. Ill. Ind. Board, 178; Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

The record clearly sustains the circuit court in holding that the award is sustained by the evidence.

The judgment is affirmed.

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SUPREME COURT OF WISCONSIN.

FRINT MOTORCAR CO.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —SCOPE OF EMPLOYMENT—DISOBEDIENCE OF ORDERS.

That a machinist disobeyed his master's orders requiring him to remain in a pit to repair cars which were racing, and in running to a car to assist in its repair was run over and killed by another car, does not put the accident outside the scope of employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

2. MASTER AND SERVANT—COMPENSATION—REDUCTION FOR FAILURE TO OBEY REASONABLE RULE—STATUTE. STATUTE.

St. 1917, § 2394—9, subd. 5, relating to reduction of compensation 15 per cent. in case of willful failure to obey a rule or order adopted for safety of employees, has no application to an accident occurring before the statute was in force.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—RELATION OF PARTIES—CASUAL EMPLOYMENT.

A machinist reguarly employed by his master in repairing its motorcars injured while present to repair its cars which were racing on Sunday, was within his regular employment and not casually employed.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PROXIMATE CAUSE OF INJURY.

The basis of recovery under Workmen's Compensation Act is that the injury be proximately caused by the accident and not intentionally self-inflicted (St. 1917, § 2394—3, subd. 3).

(For other cases, see Master and Servant, Dec. Dig. § 374.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION— LEGALITY OF EMPLOYMENT.

An illegal contract of employment does not destroy the operation of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Circuit Court Dane County; E. Ray Stevens, Judge.

Proceedings by Nettie Healey for compensation for the death of her husband, Carl Healey, employee, opposed by the Frint Motorcar Company, employer. From judgment of the circuit court, confirming an award of the Industrial Commission, the employer appeals. Judgment affirmed.

The appellant is a corporation, and at the time of the accident had a salesroom in Milwaukee. August 5, 1917, the deceased, Carl Healey,

* Decision rendered, Jan. 7, 1919. 170 N. W. Rep. 285.

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was in the employ of the appellant as a mechanic, working at the warehouse, getting $25 a week and overtime at the same rate.

Automobile races had been arranged for by the Wisconsin Auto Racing Association at the State Fair Park, near Milwaukee, Saturday, August 4, and Sunday, August 5, 1917. Different dealers entered cars in these races for the purpose of promoting the names of their various cars and getting them before the public. This was the purpose of the appellant.

The appellant had on other occasions entered cars in similar races, although entering cars in races was not a part of the regular work of appellant.

Each company entering cars had assigned to it certain space inside of the track near the starting mark, called a "pit," and was permitted to have two men in each pit for the purpose of handing out spare parts, gasoline, etc.

Healey, after doing work on the racing cars, was given charge of the pit of the appellant and was instructed to work on the cars at the pit and see that they were properly tuned up and to remain there.

On the afternoon of the day of the accident, Healey had gotten out of the pit and was standing on the fence at the inside of the track. One of the appellant's cars stopped a short distance from the pit, and Healey, seeing the car stop, ran up to where it was standing, and later getting in front of it he was run into by another car and killed.

The Industrial Commission awarded Nettie Healey $2,782.85 against the appellant because of the death of her husband, Carl Healey. The court below confirmed the award of the Industrial Commission and rendered judgment accordingly, from which this appeal is taken.

Lines, Spooner & Quarles, of Milwaukee, for appellant.

Spencer Haven, Atty. Gen., and Winfield W. Gilman, Asst. Atty. Gen., for respondents.

KERWIN, J. (after stating the facts as above). Three main contentions are made in this case: (a) That the accident was not an industrial accident; (b) that the employment was but casual; and (c) that the employment was a Sunday employment, and no recovery could be had for injury resulting therefrom.

[1] 1. Prior to the day of the injury, Healey, deceased, was in the employ of appellant under the Compensation Act (St. 1917, § 2394—1 et seq.), and at the time of the injury was performing services growing out of and incident to his employment, unless it can be said that because he left the pit provided for him during the races he thereby got outside of the course of his employment. The contention of appellant is that, because Healey left the pit provided for him and went upon the track, where he was killed, he was not at the time of the injury within the course of his employment; hence no recovery could be had. We regard this contention untenable. The mere fact that Healey was instructed to remain in the pit, and that he violated such instruction, did not put him outside of the scope of his employment.

It appears from the record that, during the course of one of the races, a car of appellant skidded and came to a stop near the fence a short distance from the point where Healey was standing upon the fence watching the races. As soon as his employer's car stopped, he jumped from the fence and ran toward it, but, before he reached it, was struck by an on-coming car and killed. We are satisfied that deceased was at the time of the injury acting within the scope of his employment, and the mere fact that he disobeyed orders does not defeat recovery. Whitehead v. Reader, 3 W. C. C. 40; Northern I G. & E. Co. v. Pietzvak (Ind. App.) 118 N. E. 132; Louisville & N. R. Co. v. Fleming, 194 Ala.

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51, 69 South. 125; Chicago Rys. Co. v. Industrial Board, 276 Ill. 112, 114 N. E. 534; Watkins v. Guest, K. & N., 5 B. W. C. C. 307; Kolaszynski v. Klie (N. J.) 102 Atl. 5; Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247; Manitowoc B. W. v. Industrial Commission, 165 Wis. 592, 163 N. W. 172.

[2] Counsel for appellant refers to section 2394—9, subd. 5, relating to reduction of compensation 15 per cent. in case of willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. This proposition has no application to the instant case, since it was not in force until September 1, 1917, which was after the accident here occurred. Chapter 624, Laws of 1917.

[3] 2. It is contended that Healey's employment was but casual. He was a regular employee of appellant, and his work was not materially different at the time of the accident from that which he ordinarily did. He was a mechanic, kept cars in proper condition, and was working in the regular course of such employment at the time of the injury; therefore his employment was not casual. Holmen C. Ass'n et al. v. Industrial Commission, 167 Wis. 470, 167 N. W. 808; Gross & Bro. Co. et al. v. Industrial Commission, 167 Wis. 612, 167 N. W. 809; Jordan et al. v. Weinman et al., 167 Wis. 474, 167 N. W. 810.

[4] 3. It is also insisted that because the accident occurred on Sunday there can be no recovery.

The contract of employment with Healey was made prior to the day of the accident, and on the day of the accident and prior thereto the relation of master and servant between appellant and Healey existed, as well as the duty imposed by law upon appellant to make compensation for injuries arising out of the relation existing by force of the Workmen's Compensation Act.

The fact that Healey was violating the Sunday law cannot defeat recovery, because it did not contribute to the injury. The right of recovery was fixed by the statute, and the relation lawfully existed between appellant and Healey at the time of the accident.

While the decisions in ordinary tort actions before the Workmen's Compensation Act was passed cannot be said to be strictly in point, some of the reasoning in these cases is pertinent. McArthur v. Green Bay & M. C. Co., 34 Wis. 139; Knowlton v. Milwaukee C. Ry. Co., 59 Wis. 278, 18 N. W. 17; Gabbert v. Hackett, 135 Wis. 86, 115 N. W. 345; Gerretson v. Rambler G. Co., 149 Wis. 528, 136 N. W. 186, 40 L. R. A. (N. S.) 451; Gross v. Miller, 93 Iowa, 72, 61 N. W. 385, 26 L. R. A. 605.

In McArthur v. Green Bay & M. C. Co., supra, in speaking upon this subject the court said, in effect, that the same state of facts which would entitle plaintiff to recover had the injury happened on any day other than Sunday would entitle him to recover notwithstanding the accident occurred on Sunday and while he was unlawfully navigating the canal.

And in Knowlton v. Milwaukee C. Ry. Co., supra, it is held that the right of the plaintiff to recover is not affected by the fact that he was violating the Sunday law, because he did not thereby become an outlaw, but was as much within the protection of the law and was entitled to the same degree of care by the defendant to protect him from injury as though he had postponed his ride on the defendant's car until the following day.

The reasoning in Gross v. Miller, supra, is in line with the Wisconsin cases above cited and holds that the fact that one is injured while violating a Sunday law in no way interferes with or prevents the right of recovery for injuries sustained while the complaining party is violating the Sunday law, because such mere violation in no way contributed to the injury; in such cases, violation of a Sunday law is not the proximate or efficient cause of the accident.

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[5] The basis of recovery under the Workmen's Compensation Act is that the injury be proximately caused by the accident and is not intentionally self-inflicted. Subdivision 3, § 2394—3.

The fact that the work was being done on Sunday did not abrogate the relation of master and servant between appellant and Healey. H. & T. C. Ry. Co. v. Rider, 62 Tex. 267. And this court has held that, although the employment contract be illegal, it does not destroy operation under the Workmen's Compensation Act. Foth v. Macomber & W. R. Co., 161 Wis. 549, 154 N. W. 369.

[6] Nor do we think that the right of recovery under the Compensation Act depends upon the validity of the contract of employment. Honnold on Workmen's Compensation, 30.

Whatever the contract may be, while the servant is doing work for the master in the line of his duty, the law imposes upon the master the duty of making the prescribed compensation for industrial accident. In such a case, the injured party does not have to resort to the illegal act to make his case. The relation of master and servant, as well as the statute providing for compensation, persists independent of the Sunday statute. Hughes v. Atlanta S. Co., 136 Ga. 511, 71 S. E. 728, 36 L. R. A. (N. S.) 547, Ann. Cas. 1912C, 394; Neanow v. Uttech, 46 Wis. 581, 1 N. W. 221; Walker v. Ontario, 111 Wis. 113, 86 N. W. 566; Derr v. Chicago, M. & St. P. R. Co., 163 Wis. 234, 157 N. W. 753.

We are satisfied that the judgment of the court below is right and must be affirmed.

The judgment appealed from is affirmed, with costs.

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UNITED STATES SUPREME COURT.

COON

v.

KENNEDY. (No. 398.)*

COURTS — SUPREME COURT — JURISDICTION — ERROR TO STATE COURT.

Decision of the highest state court, denying relief under New Jersey workmen's compensation act for drowning in navigable waters, holding that Act Oct. 6, 1917, § 1 (Comp. St. 1918, § 991 [3]), saving to claimants rights and remedies under the workmen's compensation law of any state, was inapplicable, being passed after the accident, and that the rights of parties depended on the maritime laws, *held* not one allowing review by the national Supreme Court, on writ of error, under Act Sept. 6, 1916, § 2 (Comp. St. § 1214).

(For other cases, see Courts, Dec. Dig. § 391[1].)

In Error to the Court of Errors and Appeals of the State of New Jersey.

Proceeding by Rebecca Coon for compensation under the New Jersey Workmen's Compensation Act, opposed by James Kennedy. Judgment for defendant was affirmed by the Court of Errors and Appeals of New Jersey (103 Atl. 207), and petitioner brings error. Writ dismissed.

Mr. James D. Carpenter, Jr., of Jersey City, N. J., for plaintiff in error.

Mr. Isidor Kalisch, of Newark, N. J., for defendant in error.

Memorandum opinion by Mr. Justice McReynolds.

This writ of error runs to a judgment of the Court of Errors and Appeals of New Jersey filed March 4, 1918, 103 Atl. 207, denying relief to Rebecca Coon, who sued to recover under the New Jersey Workmen's Compensation Act (P. L. 1911, p. 134), on account of her husband's death by drowning in the navigable waters of that state while employed as a fireman on a tugboat.

The court held that as the accident occurred August 4, 1915, the Act of Congress approved October 6, 1917 (40 Stat. L. c. 97, § 1, p. 395 [Comp. St. 1918, § 991, subd. 3]), "saving * * * to claimants the rights and remedies under the workmen's compensation law of any state," was inapplicable, and that under the doctrine announced in Southern Pacific Company v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 1900, the rights of the parties dependent upon the maritime law of the United States.

There was no decision against the validity of a treaty or statute of or an authority exercised under the United States, nor in favor of the validity of a statute of or an authority exercised under a state challenged because of repugnance to the Constitution, treaties or laws of the United States. Consequently, under the Act of September 6, 1916 (39 Stat. L. c. 448, § 2, p. 726 [Comp. St. § 1214]), the writ of error was improperly sued out and must be

Dismissed.

* Argued Dec. 11, 1918. Decided Jan. 13, 1919. 39 S. C. Rep. 146.

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SUPREME COURT OF CALIFORNIA.

A. F. ESTABROOK CO. ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION.*

KLAMATH S. S. CO.

v.

SAME. (S. F. 8315, 8316.)*

1. CONSTITUTIONAL LAW—MASTER AND SERVANT—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTION.

Plaintiff employer, a "resident," is not entitled to attack Workmen's Compensation, Insurance and Safety Act, § 75a, added by St. 1915, p. 1101, on the ground that it discriminates against "nonresidents" contrary to Const. U. S. art. 4, § 2, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and Amendment 14, prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws; plaintiff not belonging to the class to be discriminated against.

(For other cases, see Constitutional Law, Dec. Dig. § 42; Master and Servant, Dec. Dig. § 347).

On Petition for Rehearing.

2. APPEAL AND ERROR—POINTS NOT SUGGESTED ON ORIGINAL SUBMISSION—REVIEW.

A point not suggested in argument on which petitioner submitted case for decision will not be considered, where made for the first time on petition for rehearing.

(For other cases, see Appeal and Error, Dec. Dig. § 832[4].)

In Bank. Separate proceedings by the A. F. Estabrook Company and others and by the Klamath Steamship Company against the Industrial Accident Commission to test the validity of awards made pursuant to Workmen's Compensation, Insurance and Safety Act, § 75a. Awards affirmed.

Ira A. Campbell, of San Francisco (McCutchen, Olney & Willar and John F. Cassell, all of San Francisco, of counsel), for petitioners.

Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondent.

SLOSS, J. In North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642, we held that the Workmen's Compensation, Insurance and Safety Act, as originally enacted, did not authorize an award of compensation where injury to the employee had occurred beyond the boundaries of this state. The question decided was simply one of interpretation. It was assumed that the Legislature had power to require employers to compensate "injured employees whose employment was

* Decision rendered, March 19, 1918. On Petition for Rehearing, April 17, 1918. 177 Pac. Rep. 848.

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created in this state, regardless of the place where the injury may have been sustained." The language of the statute, as read by the court, indicated, however, that the Legislature had not intended to make the compensation scheme applicable to case of injury arising outside the state. In 1915 the scope of the act was extended by the addition of a new section (75a), reading as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." Stats. 1915, p. 1101.

We have before us, in each of the above-entitled proceedings, a writ of certiorari issued on behalf of the employer to test the validity of an award made pursuant to the terms of this section. The two proceedings are presented on a single set of briefs.

[1] The petitioners do not question the existence of the general legislative power which, in our opinion in the North Alaska Salmon Company Case, we assumed to exist. The sole ground of attack is that section 75a involves an unjustifiable discrimination against employees who are not residents of this state, and thus violates the provision of the Constitution of the United States declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" (art, 4, § 2), and that prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws" (Amendment 14, §1). Under settled principles of constitutional law, the petitioners are not in a position to raise this question. Generally speaking, the courts will not consider the constitutionality of a statute attacked by one whose rights are not affected by the operation of the statute. 12 C. J. 760; Scheerer v. Deming, 154 Cal. 133, 142, 97 Pac. 155. More specifically, a contention that a statute denies equal rights and privileges by discriminating between persons or classes of persons "may not be raised by one not belonging to the class alleged to be discriminated against." 12 C. J. 768; 10 Cent. Dig. col. 1284 et seq.; Estate of Johnson, 139 Cal. 532, 534, 73 Pac. 424, 96 Am. St. Rep. 161. Thus the validity of a statute excluding colored persons from serving on juries cannot be questioned by whites. Commonwealth v. Wright, 79 Ky. 22, 42 Am. Rep. 203. Nor may a male question the validity of a statute as discriminating against women. McKinney v. State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. On like grounds, it has been held that a resident or citizen is not entitled to assail an act on the ground that it discriminates against those who are not residents or citizens. Bozeman v. State, 7 Ala. App. 151, 61 South. 604; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N. S.) 787. 120 Am. St. Rep. 385; Gallup v. Schmidt, 154 Ind. 196, 56 N. E. 443; State v. Kirby, 34 S. D. 281, 148 N. W. 533.

Very directly in point is the decision of the Supreme Court of the United States in Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 169 (59 L. Ed. 364). The validity of the Workmen's Compensation Law of Ohio was there questioned. That law deprived a certain class of employers of five or more men of various defenses available to employers of less than five. The plaintiff in error, who was an employer of more than five, and within the class designated, assailed the legislation on the ground, among others, that the act discriminated unjustly against workmen in shops employing less than five men. The court held that this ground of attack was not available to the employer, saying:

"Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employee in a shop with five employees with those having less. No employee is complaining of this act in this case. The arguments based upon such discri-

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mination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. Southern Railway v. King, 217 U. S. 524, 534 [30 Sup. Ct. 594, 54 L. Ed. 868]; Engel v. O'Malley, 219 U. S. 128, 135 [31 Sup. Ct. 190, 55 L. Ed. 128]; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550 [32 Sup. Ct. 784, 56 L. Ed. 1197]; Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co., 226 U. S. 217, 219 [33 Sup. Ct. 40, 57 L. Ed. 193]; Rosental v. New York, 226 U. S. 260, 271 [33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71]; Darnell v. Indiana, 226 U. S. 390, 398 [33 Sup. Ct. 120, 57 L. Ed. 267]; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544 [34 Sup. Ct. 359, 58 L. Ed. 713]; Missouri, Kansas & Texas Ry. v. Cade, 233 U. S. 642, 648 [34 Sup. Ct. 678, 58 L. Ed. 1135]."

This reasoning is decisive of the present case. If section 75a contains —we do not say it does—an unwarranted discrimination against non-residents, the only persons entitled to attack the law on this ground are members of the class thus excluded from the benefits of the legislation. No constitutional right of the employer is invaded by the action of the Legislature in subjecting him to a less extensive liability than might have been imposed. Not being required to pass upon the constitutional question sought to be raised, we would not be justified in entering into a discussion of its merits.

Each of the awards is affirmed.

We concur: Angelotti, C. J.; Richards, Judge pro tem; Wilbur, J.; Melvin, J.; Victor E. Shaw, Judge pro tem.

On Petition for Rehearing.

PER CURIAM. [2] On petition for rehearing, the petitioners contend that the award should be annulled because, as is claimed, the facts were such as to bring each of the proceedings within the exclusive admiralty jurisdiction of the federal courts. No such point was suggested in the argument on which the petitioners submitted the cases for decision. It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered.

On the questions actually argued, we are satisfied with the conclusions declared in the opinion filed. The petition for rehearing is denied.

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SUPREME COURT OF CALIFORNIA.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND,

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.

ÆTNA LIFE INS. CO.

v.

SAME.

OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED,

v.

SAME. (L. A. 5732, 5739, 5740.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —BURDEN—POLICY OF LAW.

It is the policy of the law to place the burden arising from personal injuries upon the business or industry in which an injured employee is engaged, by placing the responsibility for indemnity upon the employer.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —STATUTES — CONSTRUCTION — "EMPLOYER" — "EMPLOYEE."

In defining the terms "employer" and "employee" in any statute passed in pursuance of Const. art. 20, § 21, authorizing the Workmen's Compensation Law, no definition therein contained can enlarge the scope of the constitutional authority.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Employer.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —RELATION OF PARTIES.

In determining whether or not the relationship of employer and employee existed under the Workmen's Compensation Law, the general law as well as the terms of the statute itself must be considered.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PERSONS WITHIN STATUTE — "EMPLOYER" — "EMPLOYEE."

The definitions of "employer" and "employee," in Workmen's Compensation Law, §§ 13, 14, are broad enough to include both the general and special employer.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

* Decision rendered, Dec. 24, 1918. Rehearing denied Jan. 23, 1919. 177 Pac. Rep. 273.

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5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —JOINT EMPLOYERS.

Where a partnership furnished men and a foreman to a cement company, who were to be paid by the partnership with funds furnished by the cement company, the partnership retaining the power to hire and discharge, the men were under the joint control of the partnership and the company, who were jointly associated in carrying out the work.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ACCIDENT ARISING OUT OF EMPLOYMENT—EVIDENCE.

Under the express provisions of Workmen's Compensation Law, § 77a, as amended by St. 1915, p. 1102, § 28, the hearsay declarations of decedent are admissible to find that his death arose out of the employment, within the Act.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

In Bank.

Proceedings under the Workmen's Compensation Law by Ellen R. Coulter, claimant, to recover for the death of J. A. Coulter, employee, opposed by the Employers' Liability Assurance Corporation, Limited, of London, England, the Ætna Life Insurance Company, a corporation, and the Ocean Accident & Guarantee Corporation, Limited. An award was made in claimant's favor by the Industrial Accident Commission, and the insurance carriers petition separately for writs of review. Award against Ætna Life Insurance Company and the Employers' Liability Assurance Corporation, Limited, of London, England, affirmed, and award against the Ocean Accident & Guarantee Corporation, Limited, annulled.

Willis I. Morrison and C. La. V. Larzelere both of Los Angeles, for petitioner Ocean Accident & Guarantee Corporation, Limited.

Haas & Dunnigan, of Los Angeles, for peitioner Employers' Liability Assur. Corporation, Limited, of London, England.

Henshaw, Black & Goldberg, of San Francisco, for petitioner Ætna Life Ins. Co.

Christopher M. Bradley, of San Francisco, for respondents.

WILBUR, J. These proceedings were instituted by the petitioners to review an award against them by the Industrial Accident Commission in favor of Ellen R. Coulter for the death of her husband, J. A. Coulter, alleged to have been caused by an accident of employment on November 16, 1917, at the plant of the Riverside Portland Cement Company, near Riverside, Cal. The Ocean Accident & Guarantee Corporation and the Employers' Liability Assurance Corporation were insurance carriers for the Wellman-Lewis Company, copartnership, while the Ætna Life Insurance Company was the insurance carrier for the Riverside Portland Cement Company. These insurance carriers each claim exemption from liability upon the ground that the partnership or corporation insured by them, respectively, was not the employer of the deceased at the time of his death. They also claim that the award was improper for the reason that the evidence was insufficient to establish the fact that the death of the decedent resulted from injuries arising out of or received in the course of his employment. The Ocean Accident & Guarantee Corporation also claims that the award against it is improper for the reason that both parties admitted that, by mutual mistake, the contract covered the accident in question, while the real contract was intended to cover work then being carried on at Hemet only, and that before the hearing the policy had been amended by mutual consent.

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The Riverside Portland Cement Company, which will hereafter be referred to as the "Cement Company," was engaged in manufacturing cement. It became necessary to install new machinery and to rearrange the plant. The plans and specifications for such work were made by the engineers of the Cement Company. The Wellman-Lewis Company, hereafter called the "partnership," was engaged in the business of installing and handling large machinery, and had a number of employees experienced in that line of work. The Cement Company desired to secure the services of the partnership. An arrangement was made by which the partnership furnished to the Cement Company its employees, under a foreman also employed by the partnership. The commission, upon sufficient evidence, found the facts to be as follows:

"(7) That at the time of said injury the employee was performing service upon the premises of defendant Riverside Portland Cement Company and for its benefit; that prior to his employment an arrangement had been entered into between defendant Riverside Portland Cement Company and defendant Wellman-Lewis Company whereby the latter was to secure and furnish employees, including a foreman, to perform service on the premises of and for the benefit of the Riverside Portland Cement Company, for and in consideration of the payment to said Wellman-Lewis Company of 10 per cent. of the pay roll of the employees and foreman thus furnished; that the Riverside Portland Cement Company was to furnish all materials and was to, and did in fact, give and exercise direction and control over such employees, including said foreman; that no plans and specifications were entered into for doing such work, nor was the nature and extent of the work to be done closely defined to the said Wellman-Lewis Company nor any specific sum of money agreed upon other than as stated above; that account of the time of all such employees was kept by the Riverside Portland Cement Company, such men being required to use the time clock of the said company, and a check for the wages of such employees, plus 10 per cent., and less incidental deductions, was sent to Wellman-Lewis Company, who, in turn, paid such employees their wages; that no time was agreed upon for the completion of said work, and that the Riverside Portland Cement Company reserved the right to require the furnishing of such additional employees as it should deem necessary and to cause the discharge of any employees whom it might regard as undesirable; that said agreement between Wellman-Lewis Company and the Riverside Portland Cement Company was substantially an agreement to furnish labor, skilled and experienced only; that the deceased was engaged by the representatives of Wellman-Lewis Company specifically for the work in question, and had not been a regular employee of Wellman-Lewis Company prior to his being put to work at the plant of the Riverside Portland Cement Company; that the contract of hire by which the employee was engaged was entered into between himself and defendant Wellman-Lewis Company; that the employee looked to and received his pay from Wellman-Lewis Company; that Wellman-Lewis Company had the immediate power of hiring and discharging him, and that the employee was obliged to obey any instructions given him by the foreman furnished by Wellman-Lewis Company; that Wellman-Lewis Company was in fact participating in the performance of the labor upon which the employee was engaged and by virtue of the contract exisisting between it and defendant Riverside Portland Cement Company; that at the time of said injury the deceased employee was employed jointly by defendants Wellman-Lewis Company and Riverside Portland Cement Company, who were jointly associated in the carrying on of said work."

The rules of law by which it is determined whether the position of the partnership was that of an independent contractor, and, if not, whether the Cement Company was a special employer of the deceased, are well settled. In the analysis of the cases bearing upon this subject, and in

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the discussion of cases analogous in their facts, it should be borne in mind that the reviewing courts are, in most instances, bound by the decision of the triers of fact.

[1] If the partnership in the instant case was an independent contractor, the award against the Cement Company was void. If, however, the relation of the partnership to the deceased was that of general employer, and that of the Cement Company was that of special employer, the responsibility is more difficult to determine, for the reason that the rules of law concerning the general and the special employer, fixing the status of the special employer, are largely the product of the effort to fix the responsibility of such special employer to third persons, under the doctrine respondeat superior, and that under this doctrine the question of extent of the control exercised by the person sought to be held responsible is largely decisive of the question, as obviously it should be. But the question of liability of the employer to the employee under the Workmen's Compensation Law is quite a different matter. Under that law we are fixing a liability which it is the policy of the law to place upon the business, or industry, in which the employee is engaged, by placing the responsibility for indemnity upon the employer. Rheinwald v. Builders' Brick & Supply Co., 168 App. Div. 425, 153 N. Y. S. 598; Rongo v. Waddington, 87 N. J. Law, 395, 94 Atl. 408; Kirkpatrick v. Ind. Acc. Ins. Comm., 31 Cal. App. 668, 161 Pac. 274. In the instant case the Employers' Liability Assurance Corporation claims "that the physical control and management of the employee is the determining factor as to who was the employer." The Ocean Accident & Guarantee Corporation contends that "the determining factor is, for whom were the individuals performing services, not what particular position they occupied." The Ætna Life Insurance Company claims that the Wellman-Lewis Company was an independent contractor, and therefore responsible for the death of the decedent, but also contends that, if the Cement Company be considered as an employer of the decedent, it was a special employer only, and that the decedent was in the general employment of the partnership, and that under the law of this state a special employer would not be liable for compensation. If the question were altogether new, it might be said that the person who enters into the contract of employment, express or implied with the employee, is at all times to be considered the employer, as it is contended the rule should be. Neither our own decisions, nor those of other states, have pursued this simple course.

[2, 3] The constitutional provisions authorizing the Workmen's Compensation Law of necessity uses the terms "employer" and "employee" (article 20, § 21), and it must follow that in defining the terms "employer" and "employee" in any statute passed in pursuance thereof no definition therein contained can enlarge the scope of the constitutional authority. So, in determining the question as to whether or not the relationship of employer and employee exists, we must look to the general law, as well as to the terms of the statute itself. See Carstens v. Pillsbury, 172 Cal. 573, 579, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581 158 Pac. 222. This view is in accord with the statement to that effect in Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 813, 814, 159 Pac. 721, 724, where it is said:

"It is suggested that, inasmuch as the statute enjoins upon the court liberal construction, we should ignore common-law and other definitions, and should, in determining who are and who are not employees, regard only decisions under compensation act. * * * This court has always endeavored to construe the Workmen's Compensation Act liberally and with a view to carrying out its benevolent purposes, but we cannot see why we should discard the wisdom and learning of the past in our efforts to decide what the Legislature intended by the language used."

As the law recognizes that an employee may at the same time be under a general and a special employer, it would seem to follow that the

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jurisdiction of the commission might well be predicated on either the general or special employment or both. The New York Court of Appeals took this view in deciding a recent case under the Workmen's Compensation Law of that state (Consol. Laws, c. 67). De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992. There De Noyer was employed as the driver of a truck by Cavanaugh, who was in the trucking business. The Crown Oil Company, who was engaged in the business of selling oil and gasoline, made an arrangement with Cavanaugh by which he was to furnish it a horse and driver to be used in connection with a tank wagon owned by the company for distributing oil and gasoline, and De Noyer was employed by Cavanaugh for this purpose. While he was engaged in delivering a can of gasoline from the truck of the Crown Oil Company, the gasoline exploded, causing his death. The award was made against the general employer, Cavanaugh. In reconciling that decision with Nolan v. Cranford Co., 219 N. Y. 581, 114 N. E. 1074, the court said:

"Even where no property of the general employer is intrusted to the employee to be used in the special employment, the general employer pays the compensation, may direct the employee when to go to work, and may discharge him for refusal to do the work of the special employer. The Industrial Commission, therefore, has full power to make an award against the general employer. It does not follow that by the application of this rule the special employer is not to be held in any case. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself. If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employee. Comerford's Case, 224 Mass. 571, 573 [113 N. E. 460]. Thus at one and the same time they are generally the employees of the general employer and specially the employees of the special employer. As they may under the common law of master and servant look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards (Workmen's Compensation Law [Consol. Laws, c. 67] § 3, subds. 3, 4,), and the Industrial [Accident] Commission may make such an award as the facts in the particular case may justify."

The above reference to the New York Workmen's Compensation Law (section 3, subds. 3, 4) is to the definition of "employer" and "employee" therein contained, which does not substantially differ from the definition given in our own Workmen's Compensation Laws (Stats. 1913, c. 176, §§ 13 and 14), so far as concerns the matter under consideration here.

[4] The definitions of "employer" and "employee" in our Workmen's Compensation Laws (section 13, 14) are broad enough to include both the general and the special employer, and as such contracts of employment, express and implied, were recognized before the constitutional amendment, we do not see why either or both might not give jurisdiction to the Industrial Accident Commission. While we have heretofore held that an independent contractor is not entitled to compensation under the Workmen's Compensation Law, we find nothing in our decisions which would prevent our following the rule announced by the court of Appeals of New York in the case of De Noyer v. Cavanaugh, supra, and, recognizing the fact that in some cases where, at the time of the accident, both the general and special employer exerted some measure of control over the injured person through their respective forman or employees, both should be held liable. Our attention has been called by Ætna Life Insurance Company to a case (S. F. No. 8106, Ayer et al. v. Industrial Accident Commission [no opinion]) where it was held liable by the commission as the insurance carrier of the general employer in a case where the full control of the employee was at the time of the accident

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in the special employer, and where the petition of that company for a review by this court was denied. So far as this case can be regarded as a precedent, it establishes the responsibility of the general employer, even though there was full control by the special employer. Although the commission refused to hold the insurance carrier of the special employer, the refusal to issue a writ of review would not affirm such action. The refusal of this court to review the case tends to establish the point that, where there is a general employment, this court will not hold that the commission has exceeded its jurisdiction in giving judgment against such employer, even if there is a temporary and full control in a special employer. It is not, however, necessary for us to so hold in this case. The Supreme Court of Massachusetts, however, in a recent case, has reversed an award against the general employer. Scribner's Case, 231 Mass. 132, 120 N. E. 350 (May 28, 1918). In that case the plaintiff was in the general employment of an ice company, but was injured while handling coal for a coal company, both companies being insured. Compensation was awarded against the ice company. The court reversed the decree. The test is there stated as follows:

"'In determining whether, in a particular act, he is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result.' Shepard v. Jacobs, 204 Mass. 110, 112, 90 N. E. 392, 393 (26 L. R. A. [N. S.] 442, 134 Am. St. Rep. 648). 'The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.' Coughlan v. Cambridge, 166 Mass. 268, 277, 44 N. E. 218, 219. Applying these tests, it is clear that Scribner at the time of the injury was an employee of the coal company; he was in that company's yard, engaged in its business, and doing its work; and he was under its direction and subject to its orders. Whatever may have been the relation of Scribner to the ice company in the care and management of the horses, at the time of his injury he was engaged in work over which *that company had no control.* [Italics ours.] The business was that of the coal company and under its direction. The transaction between the two companies amounted only to a loan of the ice company's servant to the coal company, the servant became the employee of the latter for the time being, and on the evidence he must be found to have assented to this, although remaining in the general employment of the ice company. Coughlan v. Cambridge, supra; Hasty v. Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; Samuelian v. American Tool & Machine Co., 168 Mass. 12, 46 N. E. 98, and cases cited.

"Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, relied on by the employee, is distinguishable. In that case the driver was on his way to water the horse which was owned by Shaw, the general employer, who retained the general direction of the employee except so far as his control was surrendered to the city of Springfield. This relation of control included the care of the horses to the extent, at least, of seeing that they were watered. When injured, the employee was under the control of the original master and occupied in his work, and not engaged in the business of the city of Springfield nor under its direction. * * * This well-established principle of the common law which holds that an employee who is lent to a special employer as distinguished from his general employer, and who assents to the change of employment, becomes the servant of the employer to whom he is lent, applies as well to cases arising under the Workmen's Compensation Act as to those at common law."

This decision is based in part upon a consideration of the provisions of the Massachusetts Workmen's Compensation Law, differing from

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our own statute, as therein stated. If we follow our own action in Ayer v. Industrial Accident Comm., supra, and the decision of the District Court of Appeal, Second District in Kirkpatrick v. Industrial Accident Comm., 31 Cal. App. 668, 161 Pac. 274, holding the general employer liable, and the Massachusetts court in the Scribner Case, holding the special employer, we reach the same conclusion as the New York court did in De Noyer v. Cavanaugh, supra, holding both or either liable.

[5] In the instant case, however, we are not required to go so far. The decision of the commission was based upon the joint control by the partnership and the cement company, and upon their finding as to such joint control their award should be affirmed. There is nothing in the decision in Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, cited by petitioners, inconsistent with this view. There the claimant, who had been given an award by the accident commission, was held to be an independent contractor, furnishing his own teams and drivers other than himself. This conclusion was reached by an application of well-established principles of law to the facts therein stated.

With reference to the claim of the Ocean Accident & Guarantee Corporation that its policy included the accident in question by reason of mutual mistake, the commission found the facts as follows:

"That said Wellman-Lewis Company was at the time of said injury insured against liability in the Employers' Liability Insurance Company, and that at that time was also insured against liability in the defendant Ocean Accident & Guarantee Corporation, and that the policy issued by said insurance carrier was unlimited and covered said employers' liability to all of its employees within the state of California; that the oral intention and understanding between defendants Wellman-Lewis Company and the Ocean Accident & Guarantee Corporation at the time the policy of the latter isurance carrier was issued was that said policy shall cover only employees employed at a magnesite mine at Hemet, Cal., but that said policy was in fact limited to correspond with said oral intentions after the sustaining of this injury by J. H. Coulter, and that none of the other parties to this proceeding was a party to said understanding prior to said injury, and the said employee, the applicant, and defendant Riverside Portland Cement Company, and Ætna Life Insurance Company, have at no time been parties to such agreement."

The facts found by the commission indicate mutual mistake; it being the intention of the Wellman-Lewis Company that the work at the cement company's plant should be covered by the insurance policy issued by the Employers' Liability Insurance Company, and that the work at Hemet should be covered by the Ocean Accident & Guarantee Corporation. After the happening of the accident, to wit, on January 5, 1918, a rider was attached to the policy of the latter company contaiing the following provision:

"It is understood and agreed that the operations covered * * * are hereby limited to cover at Hemet, Riverside county, state of California, only, and statement (4) of said policy is hereby amended to read as follows: 'Hemet, Riverside county, state of California.'"

[6] It is true that the parties to this contract of insurance could not amend the policy, after an accident, to defeat rights of compensation that had accrued before the amendment, and if the addition to the contract was in fact an amendment of the policy of insurance by mutual consent, the right of Mrs. Coulter could not be affected thereby. If, however, the policy issued differed from that actually contracted for, and by mutual mistake of the parties expressed an agreement not intended by them, there is no reason why they could not correct the provisions of the policy to state their actual intent, unless for some reason they would be estopped from doing so. There is no showing here that any of the parties whose rights are involved ever knew of the existence of this policy previous to the accident, or acted upon it in

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any way. There is no evidence that deceased had any knowledge of the policy in question. His rights as an employee resulted from his status as such employee (North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642), and not because of any interest he had in the policy or knowledge of its existence. We are not called upon to pass upon the question as to whether or not the Industrial Accident Commission could permit the reformation of a policy of insurance whether the question of the mistake was disputed. Here the parties actually consented to the amendment of the contract to conform by their intentions, and it was so amended.

[7] The point is made that there is no sufficient evidence to justify the finding that the death of the decedent arose out of his employment, for the reason that such evidence consisted in part of his hearsay declarations. The amendment to the law passed in 1915 (section, 77a, Stats. 1915, pp. 1079, 1102) expressly permits such testimony, and the evidence, therefore, is sufficient. Western Indemnity Co. v. Industrial Accident Comm., 174 Cal. 315, 163 Pac. 60.

The awards against the Ætna Life Insurance Company and the Employers' Liability Assurance Corporation, Limited, of London, England, are affirmed, and the award against the Ocean Accident & Guarantee Corporation is annulled.

We concur: Angellotti, C. J.; Sloss, J.; Lorigan, J.; Richards, Judge pro tem.

SUPREME COURT OF CALIFORNIA.

LEADBETTOR ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8602.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"ACCIDENT"—"INJURY."

There is a distinction between the terms "accident" and "injury" as used in Workmen's Compensation Act, § 20, providing that actual knowledge of injury shall be equivalent to service of notice, etc.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Accident; Injury.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—KNOWLEDGE OF INJURY BY FOREMAN—EVIDENCE.

Evidence *held* to justify Industrial Accident Commission in concluding that employer's foreman had knowledge that some injury had been suffered, though no report of accident was made, within proviso of Workmen's Compensation Act, § 20, that actual knowledge of injury shall be equivalent to notice.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

*Decisions rendered December 30, 1918. 177 Pac. Rep. 449.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MEDICAL ATTENTION—SELECTION OF PHYSICIAN BY SERVANT.

An injured servant is authorized, by Workmen's Compensation Act, § 15 (a), to select his own physician at the expense of the employer only where the latter has neglected or refused to provide the necessary services.

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXPENSE OF MEDICAL ATTENTION.

In view of letter received by employer from injured servant, employer *held* under no duty to offer further medical attention, servant having previously consulted physician of his own choice, to render employer liable for expense of further treatment.

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

In Bank.

Proceedings under the Workmen's Compensation Act by Frank G. Pryor, opposed by William Leadbettor, employer, and the Georgia Casualty Company, insurer. Compensation was awarded, and the employer and insurer bring certiorari. Award annulled, and proceeding remanded to make a new award in accordance with the opinion.

Redman & Alexander, of San Francisco, for petitioners.
Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission. The applicant, Frank G. Pryor, was a bridge carpenter, employed by the petitioner Leadbettor. On July 22, 1916, he was working at Hermosa Beach. Pryor and a number of other men were handling a heavy "bent" made of steel, when the bent settled down, crushing Pryor to the ground and resting upon his back. An injury to the ninth dorsal vertebra resulted.

[1, 2] One of the points made by the petitioners, Leadbettor and his insurance carrier, is that the applicant failed to give timely notice of his injury, as required by section 20 of the Workmen's Compensation Act (St. 1913, p. 291). That section contains the proviso, however, "that actual knowledge of such * * * injury on the part of such employer, or his managing agent or superintendent in charge of the work * * * shall be equivalent to such service." The commission found that the employer had such knowledge, and we think, there was evidence to warrant this finding. The foreman in charge of the work was present when the accident occurred. After visiting a physician for examination, Pryor returned to his work. Apparently he then thought, as did the foreman, that he had suffered no substantial injury. In fact, he rejected the foreman's suggestion that a report of the accident be made. The claim of the petitioners is, accordingly, that while the employer had knowledge of the occurrence of an accident, neither he nor his foreman was made aware that any injury to Pryor had resulted. There is, no doubt, a distinction between the terms "accident" and "injury," as used in section 20. Smith v. Ind. Acc. Comm., 174 Cal. 199, 162 Pac. 636. But the evidence is that for some time after his return Pryor was suffering pain, and was not fully able to do his usual work, and that these facts were known to the foreman. The commission was therefore justified in concluding that the foreman had knowledge that, however slight in degree, some injury had been suffered.

[3] A further contention is made on the allowance of charges for medical attendance. The statute (section 15a) imposes upon the employer

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the duty to provide medical, surgical, and hospital treatment, and, "in case of his neglect or refusal seasonably to do so," makes him liable for the resonable expense incurred by the employee in providing the same. The intent of the act obviously is that the employer shall, in the first instance, have the right to designate and select the physicians who are to give treatment to the employee. The latter is authorized to make his own selection at the expense of the employer only where the employer has neglected or refused to provide the nccessary service. City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 1915B, 847. See Mass. Bonding Co. v. Pillsbury, 170 Cal. 767, 151 Pac. 419. In this case Pryor made his own arrangements for medical and hospital aid, and the question is whether there was any evidence of neglect or refusal on the part of his employer to supply him with this service.

It appears that immediately after the accident Pryor went to see a physician, who merely examined him and permitted him to return to work. He had no further medical care while he remained at Hermosa Beach. Thereafter he went to Porterville, and while there consulted a physician, by whom he was sent to an osteopath for treatment. In October, 1916, some three months after the accident, Pryor left for Portland, Or. While there he incurred further bills for medical treatment and hospital service.

On the original submission of the application, the commission found that the employer had neglected to furnish medical and surgical services, and charged him and the insurance carrier with the value of all services rendered by physicians at the place of injury, at Porterville, and at Portland, Or. A rehearing was granted on the single issue of medical expense, and thereafter the commission made its final order, reciting that Pryor had, on the day following the accident, declined the medical treatment then tendered him by his employer, but that the employer had actual knowledge, while the applicant was in Porterville, that he was receiving further medical treatment, and had neglected thereafter to again offer medical treatment. Accordingly the employer was held liable for the charge of the physician consulted at the place of the accident, and for bills incurred in Portland, Or.

[4] No question is made of the propriety of allowing the charge of Dr. Hembree, the physician who first examined Pryor. No medical service was provided or tendered at the time of the accident, and the injured man was entitled to consult a physician of his own choice. The briefs discuss to some extent the question of whether the applicant's conduct on the next day was such as to relieve the employer from any obligation to then furnish medical service. On this question the commission, on its final hearing, decided in favor of the employer, and we must therefore start with the assumption that when Pryor went to Porterville the employer had not been guilty of any neglect upon which it could be charged with expenses thereafter to be incurred by him. At that time there was nothing to indicate to Leadbettor or the insurance carrier that Pryor either desired or needed medical attention. The conclusion that there was a subsequent neglect, and a consequent liability to pay for the bills incurred in Portland, is based upon the view that the employer had actual knowledge, while Pryor was in Porterville, that he was receiving further medical treatment, and that the defendants should, upon receiving such knowledge, have immediately offered medical treatment of their own choice. Pryor testified that he had told Leadbettor that he was receiving treatment at Porterville. But the commission found that the date of this communication could not be fixed, and made no allowance for the treatment obtained by Pryor at Porterville. On October 16th, when he was leaving for Portland, Pryor wrote a letter to Leadbettor. In it he said:

"As for myself, I was injured, while on a job at Hermosa Beach

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by a bent falling on me. My back was merely examined by Dr. Melvin [a physician at Porterville] and I was sent to an osteopath for treatment. Is the policy made out so I can send the bill to the insurance company, as it hasn't been paid yet?"

Under no reasonable interpretation can it be said that this letter conveyed to its recipient information that Pryor still required medical treatment for his injury. The plain import of the communication is that he had already received the needed treatment. The purpose of the communication is shown by the closing sentence, in which he inquires whether the bill may be sent to the insurance company for payment. The only fair interpretation of the letter is that the service had ended, and the claim on that account matured. There is no warrant for saying, in the face of this statement, that there rested upon the employer a duty to tender or supply additional medical treatment, or that his failure to do so constituted any neglect on his part. The award should therefore be modified by eliminating the provision charging the petitioners with liability for the surgical and hospital bills incurred in Portland.

The award is annulled, and the proceeding remanded to the Industrial Accident Commission for the making of a new award in accordance with the views expressed in this opinion.

We concur: Angellotti, C. J.; Melvin, J.; Wilbur, J.; Richards, Judge pro tem.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 1, CALIFORNIA.

BASSOT ET AL.

v.

UNITED RAILROADS OF SAN FRANCISCO. (Civ. 2362.)*

1. PARTIES—"REAL PARTY IN INTEREST"—EMPLOYEE.

Although adjustment and payment of compensation operated, in view of Workmen's Compensation Act, § 31, to transfer legal title to employee's claim for damages against defendant, alleged to have caused the injury to the employer, or his surety, the employee still retained an equitable interest, and was a real party in interest, in view of Code Civ. Proc. § 378; section 369 being permissive only.

(For other cases, see Parties, Dec. Dig. § 6[2].)

(For other definitions, see Words and Phrases, First and Second Series, Real Party in Interest.)

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Marcel Bassot and another against the United Railroads of San Francisco. From judgment of nonsuit entered against him, plaintiff named appeals. Affirmed.

L. M. Hoefler and George F. Snyder, both of San Francisco, for appellant.

* Decision rendered, Dec. 4, 1918. Rehearing denied by Supreme Court Jan. 30, 1919. 177 Pac. Rep. 884.

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Wm. M. Cannon and W. M. Abbott, both of San Francisco, for respondent.

LENNON, P. J. This is an action for damages for personal injuries sustained by plaintiff Bassot in a collision with the street car of defendant. At the time of the accident, Bassot was an employee of a corporation that carried compensation insurance with plaintiff insurance company. The compensation due Bassot having been adjusted and paid, this action was commenced in the name of Bassot and the company. Defendant's demurrer to the complaint on the ground of misjoinder of parties plaintiff was overruled, and, after issue joined, the cause proceeded to trial. At the close of the evidence, defendant made a motion for nonsuit as to both plaintiffs, which was granted as to Bassot on the ground that he was improperly joined as a party plaintiff, and denied as to the insurance company. The trial proceeded as between the company and defendant, and resulted in a verdict for defendant. This is an appeal by Bassot from a judgment of nonsuit entered against him. The record in the case consists simply of the judgment roll and the proceedings on the motion for nonsuit.

[1] Section 31 of the Workmen's Compensation Act (St. 1913, p. 295) provides that the making of a lawful claim for compensation "shall operate as an assignment" of any right to recover damages which the injured employee may have against any other person for the injury, and the employer or his surety "shall be subrogated to any such right." The section also provides that "any amount collected by the employer * * * in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employee." Respondent is correct in its contention that this section operates to transfer the legal title to the claim for damages to the employer or his surety, but it is also true that the employee still retains an equitable interest therein as to any surplus that may be recovered over the amount paid him by the employer, and he is therefore a real party in interest in the litigation. Although section 369 of the Code of Civil Procedure provides that "a trustee of an express trust * * * may sue without joining * * * the person for whose benefit the action is prosecuted," section 378 of that Code provides that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title." There is ample authority in this state to the effect that the provisions of section 369 are permissive only, and that the beneficiary of the trust may properly be joined as a party plaintiff with the trustee by virtue of section 378. Daley v. Cunningham, 60 Cal. 530; Cerf v. Ashley, 68 Cal. 419, 9 Pac. 658. It therefore follows that, while Bassot was not a necessary party to the suit, he was at all events a proper party thereto, and that the lower court was in error in granting the motion for a nonsuit and dismissing the action as to him.

[2] We are of the opinion, however, that the judgment should be affirmed because it affirmatively appears from the record that the error of the trial court was harmless. Although Bassot was dismissed from the action, he remained represented in court by the agent designated by the statute to represent him as plaintiff. The case was conducted to its conclusion by the attorney whom Bassot had selected to represent him. The verdict of the jury, amounting as it does to a finding that the defendant was without fault in the accident out of which the action arose, was a negation of the existence of any right whatsoever in Bassot, as Bassot's interest in the case was of necessity predicated upon a showing of negligence upon the part of the defendant and a recovery in excess of the sum that Bassot had already received as compensation.

Judgment is affirmed.

We concur: Sturtevant, Judge pro tem.; Beasly, Judge pro tem.

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DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 1. CALIFORNIA.

CROSARO ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (Civ. 2566.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —REVIEW.

Where Industrial Accident Commission had power to hold hearing, to take evidence, and to make findings thereon, its findings, though erroneous, are binding on the Court of Appeal, under St. 1913, p. 318, § 84; court's only power being in case where commission exceeds its authority.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Proceedings under the Workmen's Compensation Act by Angelo Crosaro and another for compensation for death of Guiseppe Crosaro. Order of Industrial Accident Commission refusing petitioners any allowance, and petitioners apply for writ of review to have order annulled. Affirmed.

I. F. Chapman, of San Francisco, for petitioners.

Chris. M. Bradley and Barry J. Colding, both of San Francisco (Theodore Hale, of San Francisco, of counsel), for respondents.

STURTEVANT, Judge pro tem. This is an application by the petitioners for a writ of review to have annulled an order of the Industrial Accident Commission refusing the petitioners any allowance as dependents under the Workmen's Compensation Act. The commission had regular hearings and made a full set of findings. From the latter it appears that the petitioners are, respectively, the surviving father and mother of Guiseppe Crosaro, who was killed in an accident in the early part of 1918; that Guiseppe was 23 years of age at the time of his death and had never been married. There is an express finding that neither of the petitioners was, at the time of the death of Guiseppe, "wholly nor partially dependant upon the employee for support." In their application the petitioners aver that said last-mentioned finding is not supported by the evidence, and they ask that the order of the commission refusing them an allowance as dependents be annulled.

We think the prayer of the petitioners cannot be granted. The commission took evidence on the subject of dependency, and the evidence shows that the petitioners could have lived, and did live, on the earnings of the father; and, as the commission had the power to hold the hearing, to take evidence, and to make findings thereon, such findings are, under these facts, binding on this court. True, the petitioners allege that "the findings are not supported by the evidence," but their real contention in this behalf is that the commission erred in its conclusions based on the evidence. Not intimating that the commission erred, yet if it did no court has power to correct mere errors of the commission. Stats. 1913, p. 279, § 84. It is only excess of power that can be examined into by the courts. As an abstract proposition, power to hear and determine is power to determine it wrong as well as right. McFarland v. McGowen, 98 Cal. 331, 33 Pac. 113.

* Decision rendered, Nov. 25, 1918. 177 Pac. Rep. 489.

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The order of the commission is affirmed.
We concur: Lennon, P. J.; Beasly, Judge pro tem.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 1, CALIFORNIA.

CELLA

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (Civ. 2570.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—MEDICAL CASE—RIGHT TO AWARD.

Where workman, directed by master to one hospital, went to another and was refused care, he was not entitled to an award for medical services under St. 1913, p. 290, § 19, subd. (b).

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

Application by Rafaelo Cella, sometimes known as R. Lee for writ of review to annul an order of the Industrial Accident Commission, denying an award in petitioner's behalf in his proceeding for workmen's compensation opposed by the Producers' Hay Company, employer, and the Ætna Life Insurance Company, insurer. Order of the Commission affirmed.

I. F. Chapman, of San Francisco, for petitioner.
Chris. M. Bradley and E. L. Stockwell, both of San Francisco, for respondents.

STURTEVANT, Judge pro tem. This is an application for a writ of review for the purpose of having annulled an order made by respondents refusing to make an award in behalf of the petitioner covering hospital charges.

About November 9, 1917, Rafaelo Cella was injured while in the employment of Producers' Hay Company (which is hereinafter refered to as the company). On the 16th he was told by the company's physician to go to the St. Francis Hospital. The petitioner did not do so, but went to St. Joseph's Hospital, and now claims that he did so through ignorance. In this behalf he alleges that he is an Italian, and can neither read, write, nor speak English. However, the fact was clearly established that the petitioner was directed to go to the St. Francis Hospital and the address was given in writing. These facts do not show any neglect or refusal on the part of the company to furnish the petitioner hospital service. Yet it is clear that the commission could not make an award to petitioner for such services except it be first shown that the company had neglected or refused to furnish such service. Stat. 1913, p. 279, § 19, subd. (b). The respondent commission did not exceed its jurisdiction in refusing the petitioner an award. Its order is therefore affirmed.

We concur: Lennon, P. J.; Beasly, Judge pro tem.

* Decision rendered, Nov. 25, 1918. 177 Pac. Rep. 490.

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DISTRICT COURT OF APPEAL OF CALIFORNIA.

SECOND DISTRICT, CALIFORNIA.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENG., ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL.

(Civ. 2491; L. A. 5422.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—"COURSE OF EMPLOYMENT."

A street flushing motor truck operator, who fell from truck in effort to pick up wrench from footboard while manipulating water discharge lever, was injured in "course of employment," though at time of injury one not an employee was running the truck by his permission.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Proceedings under the Workmen's Compensation Act (St. 1913, p. 279) by Earl A. Booth for compensation, opposed by Tyron & Brain, copartners, employers, and the Employers' Liability Assurance Corporation, Limited, of London, England, insurer. Award by the Industrial Accident Commission of the State of California, and the employer and insurer make application for writ of review. Affirmed.

George H. Moore, of Los Angeles, for petitioners.

Christopher M. Bradley, of San Francisco, and Warren H. Pillsbury, of Oakland, for respondent.

WORKS, Judge pro tem. The petitioners Tryon & Brain, copartners, were engaged in the operation of certain street flushing motor vehicles in the city of Los Angeles, and Earl A. Booth was the driver of one of them. He was forbidden by his employers to permit any person to ride on the vehicle with him while he was in the discharge of his duty. Nevertheless, upon the occasion which is of interest in this proceeding, he had in company with him one Schilling, while he was engaged in his work. The truck operated by Booth had a seat across the front capable of accommodating two persons. Immediately in front of the right side of the seat was the steering wheel by means of which the truck was guided, the vehicle being what is known as a right-drive machine. It was on the right side of the seat, therefore, that Booth was accustomed to sit when the truck was in service in his charge. On the occasion now in question, however, Schilling, who was an experienced motor driver, occupied the right side of the seat and operated the car. Booth was at his left and, while the truck was moving forward under the guidance and operation of Schilling, was engaged in the manipulation of a lever which controlled the discharge of water upon the street. While so engaged, Booth observed a wrench lying on the footboard of the truck. He feared it was about to fall into the street and reached over to pick it up. In his attempt to do so he pitched to the ground and suffered severe injuries

* Decision rendered, March 22, 1918. On Rehearing by Supreme Court in Bank, May 21, 1918. 177 Pac. Rep. 171.

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from the fall. At the time, the truck was moving over a smoothly paved street, and there was no jar nor shock to which Booth's fall could be attributed.

Because of the injuries suffered by him, Booth made application to the respondent Accident Commission for compensation, and it was awarded him. In this proceeding the petitioners seek to have the award annulled.

Petitioners' first point is that Booth's injury did no occur in the course of his employment, for the reason that when he surrendered the running of the truck to Schilling he stepped aside from his employment and took upon himself an added risk not within the course of the employment. Counsel cite several decided cases to the general point that compensation may not be awarded an employee where he departs from the performance of his regular work and takes up the discharge of another task for his employer, which latter is different from the ordinary work which the employee was engaged to perform. One of these cases, taking it as a sample of them all, is Robert Sherer & Co. v. Ind. Acc. Com'n, 185 Cal. 615, 166 Pac. 318. In that case the employee was a night watchman on a locomotive, but he was injured when he was away from the locomotive altogether and while performing work entirely distinct from his duty in connection with it. He had left the engine and had temporarily taken the post of a night watchman on a steam shovel owned by the same person who owned the locomotive, the steam shovel being some distance from the locomotive. While the employee was on the steam shovel he lost his life, and the Supreme Court held that he was not entitled to compensation, because he was outside the course of his employment at the time. That case and the others like it do not aid us now. The employee of Tryon & Brain did not abdicate either the place or the character of his employment. He gave up a part of his work to another, it is true, as he permitted Schilling to run the truck, but it was strictly within the line of his duty to operate and care for the levers which controlled the flow of water from the tank of the truck to the street. The same may be said of his attempt to prevent the wrench from falling from the footboard. He was not outside the course of his employment merely because he allowed a stranger to perform a part of his task while he was engaged in the performance of the remainder of it. It is a part of petitioners' contention on this point that Booth took upon himself a risk outside of his employment in permitting Schilling to run the truck; but that does not appear to be the case. In fact, the contrary appears. The accident, so far as any connection of Schilling with it as a causative factor is concerned, happened in no manner different from the following imaginary case: We will suppose the truck to be standing still for some proper reason, let us say, while the truck tank is being filled from a fire plug at the curb. As the truck stands, let us also suppose Booth to be occupying the left side of the seat, either because the fire plug is on that side and he will soon be called upon to turn off the water, or for any other reason. He discovers the wrench on the footboard and, in reaching for it, falls from the car, either because he becomes overbalanced, or his foot slips, or his hand misses its hold upon some handle or projection he has attempted to seize as he leans forward. In such a case he would undoubtedly be entitled to compensation, and the record here discloses no different state of facts, so far as legal effect is concerned.

The petitioners contend that Booth was intoxicated, and that his injury resulted from his being in that condition. They insist that a finding of the respondent commission that he was not intoxicated is not sustained by the evidence. They do not contend that there was no evidence before the commission on both sides of this question, but they insist that the testimony to the effect that Booth was not intoxicated was "intrinsically unbelievable." We do not so regard it. The commission

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was within its province, under all the evidence, in determining that Booth was not intoxicated at the time of the accident.

The petitioners insist that there should be an annulment of the award to the extent that it allows the amount of a certain bill for hospital charges and for the services of physicians. They say that no evidence was taken upon the question, and that the only showing of record in support of the allowance of the bill is a statement of charges at a hospital, filed seven days after the case was submitted to the commission for decision. This bill was filed pursuant to a stipulation entered into at the hearing, within the terms of which it appears properly to come, both as to its subject-matter and as to the time of its filing.

The award is affirmed.

We concur: Conrey, P. J.; James, J.

Opinion of Supreme Court in Bank, denying rehearing.

PER CURIAM. The petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal for the Second Appellate District is denied.

MELVIN, J. (dissenting). I dissent from this court's refusal to transfer the case to the Supreme Court.

The man to whom the Industrial Accident Commission awarded compensation was the driver of a street-flushing motor vehicle. His duty was to operate and guide the machine and, incidentally, to manipulate the lever by which water was discharged upon the street. The only place from which he could perform these services was the right side of the seat. He was forbidden to allow any one to ride with him, but in violation of orders had permitted another man to take the steering gear while he moved to the left-hand side of the seat. While seated there he endeavored to pick up a wrench from the footboard on that side of the truck, and in so doing lost his balance, fell and was injured.

It is clear that if the driver had been in the place where his obligation to his employers required him to be, he would not have met with this accident. The fact that he was using the lever for the release of the water—a part of the work intrusted to him—is a false quantity in the problem. His was not a divided duty. He was not required to steer the car part of the time from the right-hand side of the seat and to work the lever a part of the time from the other side. His place of duty was at the steering wheel. This place he had abandoned in disobedience to orders, and if he had done the work for which he was hired and paid, he would not have met with this accident. If the man had left his machine; had gone to Casey's saloon for a drink; and while there had been hit by a hardwood bung starter wielded by a strong-armed bartender, no one would pretend that his employer was bound to compensate him. Yet his position on the left-hand side of that seat was logically as flagrant a departure from his post of duty as would have been his presence at Casey's bar. The case of Sherer & Co. v. Industrial Accident Commission, 185 Cal. 615, 166 Pac. 318, is absolutely in point, and is utterly opposed to the conclusion reached by the Industrial Accident Commission, the District Court of Appeal and the majority of the Justices of this court.

I concur: Lorigan, J.

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SUPERIOR COURT OF DELAWARE.

NEW CASTLE.

BENJAMIN F. SHAW CO.

v.

PALMATORY ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPENDENTS.

Persons in the enumerated classes in Workmen's Compensation Law, § 104, par. 8, may be wholly or partially dependent on the employee and come within the contemplation of the provisions, if dependency existed at the time of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—"DEPENDENT."

One claiming to be a "dependent" under the Workmen's Compensation Act, § 104 par. 8, must show that the contributions of a deceased employee were relied upon for his living, judging this by the position in life of the claimant, mere receipt of contributions to maintain in idleness those who are able and have the capacity to provide for themselves not making them dependents.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEPENDENCY—"SUPPORT."

"Support," as applied to "dependency" under Workmen's Compensation Law, § 104, par. 8, is broader than food, clothing, and shelter, and includes all such means of living as would enable a claimant to live in the degree of comfort suitable and becoming to his station of life, but does not include luxuries.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEPENDENCY.

The condition of health of a claimant under Workmen's Compensation Law, § 104, par. 8, and the need for medicines and medical attention are subjects proper for consideration in determining the question of dependency.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEPENDENCY—BURDEN OF PROOF.

While dependency under the Workmen's Compensation Law, § 104, par. 8, may involve principles of law, dependency is a question of fact, and the burden of proving it rests upon him who claims it.

(For other cases, see Master and Servant, Dec. Dig. § 403.) Series, Support.)

* Decision rendered, Jan. 29, 1919. 105 Atl. Rep. 417.

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6. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEPENDENCY—SUFFICIENCY OF EVIDENCE.

In a proceeding under the Workmen's Compensation Law, evidence *held* sufficient to sustain a finding that claimants, the father and mother of deceased, were dependent within the meaning of section 104, par. 8.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Proceedings under the Workmen's Compensation Act by John Earl Palmatory and May Palmatory, to obtain compensation for the death of Earl Palmatory, a son, opposed by the Benjamin F. Shaw Company, a corporation, the employer. There was an award of compensation by the Industrial Accident Board, which was sustained by the Superior Court, and the employer appeals. Award sustained.

Appeal from award of Industrial Accident Board of the State of Delaware, New Castle County, No. 3784 (November 6, 1918.)

Action by Benjamin F. Shaw Company, employer, against John Earl Palmatory and another, dependent claimants. On appeal from the award of the Industrial Accident Board. Award sustained.

Boyce and Rice, JJ., sitting.

H. H. Ward, of Wilmington, for appellant.
Levin Irving Handy, of Wilmington, for appellees.

The appeal was heard by the Superior Court on the record of the proceedings before the Industrial Accident Board sent up to the court on citation under rule 86A of said court.

The ground of the appeal was that the testimony before the said board contained in the record sent up, did not show proof of the dependency of the appellees upon Earl Palmatory, their deceased son. There were no questions raised as to the regularity of the proceeding before the board. The facts on which the appeal was based sufficiently appear in the opinion of the court.

The provision of the statutes under which the proceeding was had before the board is Code, § 3193k, section 104, paragraph 8, 29 Laws of Del. 763 (771), and is quoted in the opinion of the court.

The board found that there was neither widow, widower or children of the deceased. He was survived by his father and mother who were joint claimants. The question was whether they were dependent to any extent upon their son, the employee of the appellant, for support at the time of his death.

It was argued by counsel for the appellant that the inquiry is limited to the time of the death of the deceased. The following cases were cited as containing acceptable definitions of dependency under the statute: Dazy v. Apporang Co., 4 N. C. C. 594; Simmons v. White Bros., 1 Q. B. 1005; In re Hora, vol. 1, No. 7, Bul. Ohio Indus. Com. 173 (Nov. 5, 1914); Blanton v. Wheeler & H. Co., 91 Conn. 226, 99 Atl. 494, Ann. Cas. 1918B, 747; Gherardi v. Conn. Co., 92 Conn. 454, 103 Atl. 668.

The mere fact that the parent receives money from his son and spends it in support of the family is not alone sufficient to establish a claim of dependency under the Workmen's Compensation Law (29 Del. Laws, c. 233). Main-Colliery Co. v. Davies, 69 L. J. Q. B. 765, 6 N. C. C. A. 243; Rolin Tomalvage et ux. v. Lehigh Valley Coal Co., 3 Workmen's Compensation Sup. Department Reports of Penna. 1447; Nicola Donetti v. Berwinde White Coal Mining Co., 3 Workmen's Compensation Sup. Department Reports of Penna. 15; Harry Johnson v. Bethlehem Steel Co., vols. 1, 2, 3 Workmen's Compensation Sup. Department Reports of Penna. 2181; Micanko v. Rochester & Pittsburgh Coal & Iron Co., Dist. No. 6, Claim Petition No. 5483, Reported in the Legal Intelligencer.

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Counsel for the appellees contended that the award of the Industrial Accident Board should not be disturbed because the facts contained in the record justified the finding of the board; and that the vital question was, whether the appelles relied upon the contributions made by the son in their mode and manner of living. Bradburys' Compensation, 315; 13 Neg. Con. Cases, 318, 319, 325; Kraus v. Fritz & Son, 87 N. J. Law, 321, 93 Atl. 578, L. R. A. 1916A, 123, 249 (251); Conn. Com. Dig. (1914) 16; Pa. Workmen's Com. Bd. (1916) 74, 106, 286.

RICE, J., delivering the opinion of the Court:

This is an appeal by the Benjamin F. Shaw Company from the finding of the Industrial Accident Board that John Earl Palmatory and May Palmatory were dependent to some extent upon Earl Palmatory, the decedent, for support at the time of his death.

It is admitted "that on the 13th day of September, A. D. 1918, Earl Palmatory who at the time was living at No. 304 Monroe street, Wilmington, Delaware, sustained a personal injury while in the employ of the Benjamin F. Shaw Company, by an accident arising out of and in the course of said employment within the state of Delaware, and as the result of said accident the said Earl Palmatory died on the said 13th day of September, A. D. 1918."

Earl Palmatory lived with his father and mother and the family included another son aged twenty-four years, now in France, and a daughter thirteen years of age. The daughter attended school and was not employed.

The decedent at the time of the accident was a minor in his eighteenth year. He had worked since he was nine years of age and for some time previous to his death had been earning on an average of $21.60 per week. He had, since going to work, always given all his wages to his mother who would give him spending money and purchase his clothes.

The mother used the rest of the money received from her son to pay the rent amounting to nine dollars per month, to dress his sister, to pay the household expenses, and infrequently to pay the store bills.

John Earl Palmatory, the father, earned between twenty-five and thirty dollars per week and used his money to pay the store and fuel bills and provide clothing for himself, and sometimes he gave money to his wife. The father did not state what he did with the balance of the money. He testified that the family could not have lived as they had if Earl had not contributed to their support.

May Palamtory, the mother, had been working for three months prior to her son's death and she had earned $13.60 per week. Her health has been poor since a month before the accident to Earl, and since his death she has not been able to work. She saved no money and what she earned and received from her husband and son was spent for household expenses and clothing.

Code, § 3193k, section 104, par. 8, 29 Laws of Delaware 763 (771) the Workmen's Compensation Law provides:

If there be neither widow, widower nor children, then to the father and mother, or the survivor of them, if dependent to any extent upon the employee for support at the time of his death, twenty per centum of wages.

[1] Persons in the enumerated classes may be wholly or partially dependent on the employee and come within contemplation of the provisions of this section if the dependency existed at the time of the injury. The question arises what may be considered dependency? The term has frequently been defined by the courts of this country and of England and we think it not possible to state a complete and exhausted definition of the word as used in Workmen's Compensation Laws; but the definition stated by the court in the case In re Hora, vol. 1, No. 7, Bul. Ohio Industrial Commission, 173, is as satisfactory as any we have seen.

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The court in that case defined dependency to be "dependent for the ordinary necessities of life for a person of that class and position in life, taking into account the financial and social position of the recipient."

[2] It is not sufficient that the contributions of the employee were used in paying the living expenses of the claimant but it must be shown that the contributions of the employee were relied upon by the dependent for his or her means of living judging this by the class and position of life of the dependent. Powers v. Hotel Bond Co., 89 Conn. 143, 93 Atl. 245.

The fact that a man is by his best efforts able to provide his family with the bare necessities of life would not prevent him from being a dependent under our statute for the words of the statute convey a much broader meaning than this. On the other hand, the mere fact that contributions had been made by the deceased workman to a claimant who had the health and ability to support himself and family by his own reasonable efforts but did not do so, would not constitute the claimant a dependent, for it was not the intent of the Legislature to maintain in idleness at the expense of the employer those who are able and have the capacity to provide for themselves and have no appealing reason for not doing so.

[3, 4] So many facts may be considered, in determining the question whether under paragraph eight a claimant may or may not be considered a dependent, that, on the one side, it would be impossible to state all the circumstances under which one in the emmerated classes would be considered a dependent, and on the other side, to state all the circumstances under which he or she would not be considered a dependent. Each particular case must be decided upon the facts and circumstances of the case, existing at the time of the injury. However, the test of dependency generally speaking is whether the claimant relied upon the employee's contributions for his support wholly or partially judging this by what would be reasonable living expenses for persons in the same class and position. Support as used within the meaning of the statute is of a broader import than food, clothing and shelter and may include many things besides these. It includes all such means of living as would enable the claimant to live in a style and condition and with a degree of comfort suitable and becoming to his station of life. What would be considered a reasonable support for one family might be a bare existence for another of a different class and position The same things which would constitute means of living for persons in one class or position might mean luxuries for those of another class. We believe it was not the intention of the Legislature to provide for luxuries. The condition of health of a claimant and the need for medicines and medical attention are subjects proper for consideration in determining the question of dependency for support.

[5] While the question of dependency may involve principles of law, the fact remains that dependency is a question of fact to be determined from all the circumstances of the case and the burden of proving it rests upon him who claims it.

In the case now before us on appeal the evidence taken before the Accident Board is not of an altogether satisfying character. Their and our task might have been considerably lightened if the board had interrogated the claimants and brought out in greater detail the amounts expended by the members of the family and necessary for their support. The members of the board probably were reluctant to do this by reason of the fact that the claimants were represented by counsel, but this should never prevent them from eliciting from the witnesses testimony in respect to relevant and pertinent facts concerning which it is desirable for the board to have full information before passing on the question of dependency and support. They should seek to obtain from the witnesses full information concerning matters before them for determination whether the claimants are or are not respresented by an attorney, as they are authorized by section 3193q (section 110).

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[6] While, as we have stated, the evidence was not of an altogether satisfactory nature yet we are of the opinion that the evidence before the board, as disclosed by the record, was sufficient to warrant the board in finding the claimants dependent to some extent on the employee for support. It appears from the record that the needs of the family were moderate and while it may be said that the family were not very methodical in matters pertaining to money yet there was no evidence to show that the family lived extravagantly. The mother, in making her estimates, on the limited number of items entering into the support of the family about which she was questioned, must have understated rather than overstated them. She had been able to save nothing notwithstanding the fact that she had been working for three months, and, although she had been unwell for a month prior to her son's death, she had continued to work. She also stated that on account of her condition of health she had not been able to work since. It does not appear from the record what the father did with his money remaining after paying the store, fuel and his clothing bills, and it would have been of some assistance in deciding this case if he had been questioned concerning this. However, the money remaining in his hands after paying the bills he always paid was not over five or ten dollars a week and this would not be nearly sufficient to make up if used in the support of the family what they lost when the son ceased to contribute to the support of the family on account of his death.

The finding of the Industrial Accident Board is sustained.

SUPREME COURT OF ILLINOIS.

CENTRAL GARAGE OF LA SALLE

v.

INDUSTRIAL COMMISSION ET AL. (No. 12371.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ACCIDENT ARISING OUT OF EMPLOYMENT.

Where a chauffeur, employed to drive a passenger to a certain town, reached his destination ahead of time, and at his suggestion drove the passenger around for their mutual pleasure, and on such pleasure trip was shot by the passenger, who suddenly became insane, the death did not arise out of the employment.

(For other cases, see Master and Servant, Dec. Dig § 375[1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INJURIES OUT OF AND IN COURSE OF EMPLOYMENT.

In proceedings under the Workmen's Compensation Act, the burden is on claimant to show that the injury arose out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

Error to Circuit Court, La Salle County; Edgar Eldredge, Judge.

Proceeding under the Workmen's Compensation Act by Benjamin T. Dresbach, administrator of the estate of Joseph Derix opposed by the

* Decision rendered, Dec. 18, 1918. Rehearing denied, Feb. 6, 1919. 121 N. E. Rep. 587.

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Central Garage of La Salle, employer. An award by the Industrial Commission was affirmed on certiorari, and the employer brings error. Reversed and remanded, with directions.

Russell B. James and McDougall, Chapman & Payne, all of Chicago, for plaintiff in error.

Browne & Wiley and Butters & Clark, all of Ottawa, for defendant in error.

FARMER, J. This writ of error was sued out to bring up for review a judgment of the circuit court of La Salle county, affirming an award made by the Industrial Commission under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) in favor of defendant in error.

Joseph Derix was a chauffeur in the employ of the Central Garage of La Salle. The night of July 17, 1916, he was sent by his employer to drive a car and carry a passenger named Bernard Sherman from La Salle to Ladd, Ill. The next morning his dead body was found by the roadside between 1½ and 2 miles beyond Ladd, and not on the road leading from La Salle to Ladd. He had been shot by the passenger. His administrator presented a claim for compensation to the Industrial Commission, and a hearing was had before an arbitrator. It was agreed both parties were subject to the Compensation Act. The arbitrator denied the claim for an award, and a review was had before the Industrial Commission, which allowed the claim for compensation, and fixed the award at $32.50 per month for a period of 96 months, commencing from the date of the death. The action of the board was reviewed by the circuit court on certiorari, and the award affirmed. The presiding judge made a certificate that the case was a proper one for review by this court, and the record is brought here for review by writ of error.

It is contended by plaintiff in error that the Industrial Commission had no jurisdiction to review the finding of the arbitrator, because no petition for that purpose was filed within the time required by law, and also that no award was authorized in any event, because the accident did not arise out of and in the course of the employment of the deceased.

The only explanation given of the death of Derix, and why his body came to be at the place it was found, is the testimony of Bernard Sherman. In 1914 Sherman was confined in the insane asylum at Elgin, from which he escaped after having been there about two months. He was not apprehended and recommitted, and appears to have been working at or near Woodstock just prior to the time he hired the car to go to Ladd. There can be no doubt he shot and killed Derix. He claims his mind had suddenly become blank, and he remembered very little about it. He was indicted for the murder of Derix, and in November following was tried as to his sanity, found insane, and sent to the asylum for insane criminals at Chester. It is not questioned that Derix left La Salle with Sherman for Ladd at about 11 or 11:30 o'clock at night. As we understand it, the distance is about 15 miles. Sherman had called at the garage earlier in the evening and talked with the manager about hiring a car and driver to go to Spring Valley. At that time he inquired about what railroads passed through Spring Valley. About 11 o'clock he called the garage by telephone and asked for a car to go to Ladd. He was then at the Rock Island depot in La Salle. Derix was given an Overland car and sent to get Sherman and take him to Ladd. Sherman testified that the reason he changed his destination from Spring Valley to Ladd was that he wanted to get a train on the Milwaukee Railroad and had learned such railroad did not pass through the former place, but did pass through Ladd. He learned the train he wished to get would arrive at Ladd at about 1:30 o'clock in the morning. Between the time he had spoken to the garage man about the car and the time he started on his trip to Ladd he had visited saloons in La Salle and

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had taken some drinks. When he started on the trip he testified he had a pint bottle and a half-pint bottle of whisky. On the way they passed through Spring Valley, and stopped at one or more saloons, where Sherman had some drinks; but it is not clear, and it is denied, that Derix drank there. Sherman testified that by the time they arrived at Ladd he and Derix had consumed the two bottles of whisky, except about one-fourth of a pint. When they arrived at Ladd, and when in the vicinity of the depot, Sherman started to prepare his suit case to take out of the car and go to the depot. It was then in the neighborhood of 12:30 o'clock. Derix inquired of him what time his train would arrive, and he replied at 1:30 o'clock. Derix said they had an hour or more yet, and proposed that they continue their drive. He said he could tell his boss he had tire trouble. Sherman agreed, and they drove out of Ladd north and east something like 2 miles. Sherman testified he remembered seeing some gravel in the road, and that his mind then went blank. He also had some recollection or impression of an argument that he had with Derix, and that he used his revolver after leaving Ladd and before arriving at Clinton, Iowa. He testified he was partially drunk, and that both of them were "pretty well under the weather." There was no proof that Derix was in the car when he was shot, but the fact that there was no blood in or on the car, or other indication that he was shot while in the car, makes it at least doubtful that he was shot in the car.

Having reached the conclusion that the award was unauthorized on the merits of the case, it is unnecessary to pass upon the preliminary question that the petition for a review by the Industrial Commission was not filed within the time required by law.

We have endeavored to set out the substance of the material facts upon which it must be determined whether the accident arose out of and in the course of the employment of Derix.

In Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764, the accident occurred during the employment, but while the employee was doing something he was not employed to do. The court quoted the rule announced in Moore v. Manchester Liners, A. C. 498, that an accident to an employee occurs in the course of the employment when it takes place "while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing," and said:

"It is the rule that an employee is engaged in the course of his employment when the injury occurs within the period of his employment, at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it."

A number of cases are cited and reviewed in the opinion sustaining the rule announced. The rule announced in that case was expressly approved and adhered to in International Harvester Co. v. Industrial Board, 282 Ill. 489, 118 N. E. 711, and Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028. Discussing the question when compensation may be awarded on the ground that an injury to an employee arose out of and in the course of the employment, the Supreme Court of Massachusetts said in Re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306:

"In order that" there may be recovery "the injury must both arise out of and also be received in the course of the employment. Neither alone is enough. * * * It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury."

The adjudicated cases, American and English, so far as we are in-

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formed, universally hold that an injury to an employee while engaged in a voluntary act, not accepted by or known to the employer and outside the duties for which he is employed, cannot be said to arise out of his employment. Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149, and Alexander v. Industrial Board, 281 Ill. 201, 117 N. E. 1040, are clearly distinguishable from the decisions above cited, and not in conflict with the rule there announced.

[1] Defendant in error contends Sherman killed Derix in order to obtain possession of the car, and from this premise argues that the death arose out of the employment. There was no proof to support that position, except the inference from the fact that Sherman drove the car to Clinton, Iowa, after the killing and offered to sell it for $300. Sherman testified he did not intend to steal the car; that he hired it to drive to Ladd, where he intended taking a train on the Milwaukee railroad at 1:30 o'clock. After reaching Ladd, and while on a pleasure ride, which, so far as any proof in the record shows, was taken at the suggestion of Derix and was outside the duties of his employment, Sherman claims his mind became a blank, and he had nothing but a confused memory of what occurred from that time until the next day, when he found himself in possession of the car, which he drove to Clinton, were he tried to sell it. Derix's employment only authorized and required him to deliver Sherman at the depot in Ladd. There is no suspicion from anything in the record that before the arrival at Ladd there was any thought or purpose on the part of Sherman to harm Derix or get possession of the car, and the inference is clearly warranted that, if Derix had delivered Sherman at the depot in Ladd, which was what he was employed to do, he would not have been harmed. The pleasure drive from Ladd, according to the proof, was not taken at the suggestion of Sherman, but was proposed by Derix, and was not only outside of his employment, but was known by him to be contrary thereto, as shown by the excuse he proposed to make to his employer for his later return to La Salle.

[2] The burden of proof rested upon defendant in error to show that the injury arose out of and in the course of the employment. Ohio Building Vault Co. v. Industrial Board, supra. It is true Sherman cannot be considered a very reliable witness, because at times, at least, he appears to have been crazy; but his testimony that after arriving at Ladd the parties went for a drive, which formed no part of the employment of Derix, is corroborated by the circumstance of finding the dead body of Derix at the place it was found the next day. There is no proof in the record from which it can be legitimately inferred that Derix was killed by Sherman while he was performing any duty of his employment.

The Judgment is reversed, and the cause remanded, with directions to the circuit court to set aside the award of the Industrial Commission.

Reversed and remanded, with directions.

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SUPREME COURT OF ILLINOIS.

NEW STAUNTON COAL CO.

v.

FROMM. (No. 12160.)*

1. MASTER AND SERVANT—DUTY OF MASTER—SAFE PLACE.

It is the duty of an employer to use reasonable care to provide an employee a reasonably safe place in which to work.

(For other cases, see Master and Servant, Dec. Dig. §§ 101, 102 [8].)

2. PLEADING—CONLUSION OF LAW—DUTY.

An allegation that it was defendant's duty to do certain things was an averment of a conclusion, it being necessary in pleading duty to allege facts from which the law will raise the duty.

(For other cases, see Pleading, Dec. Dig. § 8[8].)

3. MASTER AND SERVANT—INJURY TO EMPLOYEE—PLEADING—SUFFICIENCY OF COMPLAINT.

A complaint that employer operated mine, that employee was engaged in loading coal in room 46, the roof of which was in dangerous condition, to employer's knowledge, the employer knew employee was working in such room and permitted him to continue, and that by reason of such negligence employee was injured, *held* sufficient allegation of employee's duty, breach thereof, and injury resulting therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 258[2].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WAIVER—ASSUMED RISK.

Employer who has elected not to accept Workmen's Compensation Act has waived its right to interpose the common-law defense of assumed risk.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

6. MASTER AND SERVANT—INJURY TO EMPLOYEE—SAFE PLACE TO WORK—COAL MINE.

Evidence *held* to show that defendant coal mine operator negligently permitted plaintiff employee to work under a dangerous roof.

(For other cases, see Master and Servant, Dec. Dig. § 278[10].)

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, Madison County; J. F. Gillham, Judge.

Action by Peter Fromm against the New Staunton Coal Company. Judgment for plaintiff affirmed by Appellate Court, and defendant petitions for certiorari. Affirmed.

William E. Wheeler, of East St. Louis, for plaintiff in error.
Harold J. Bandy, of Granite City, for defendant in error.

CARTER, J. This was an action brought in the circuit court of Madison county by defendant in error against plaintiff in error to recover damages for personal injuries sustained by him in the coal mine of plaintiff in error. A verdict for $2,000 was obtained in favor of defendant in error,

* Decision rendered, Dec. 18, 1918. Rehearing denied Feb. 5, 1919. 121 N. E. Rep. 594.

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upon which judgment was entered. An appeal was taken to the Appellate Court for the Fourth District, where the judgment was affirmed, and the cause has been brought here by certiorari.

The original declaration filed September 16, 1916, consisted of two counts. A general demurrer filed to both these counts was sustained, and February 16, 1917, defendant in error filed an amended declaration of eight counts. A demurrer was sustained to the first seven of these counts, and the eighth count was thereafter abandoned by defendant in error, who later, March 28, 1917, filed an amended declaration consisting of five counts. This last declaration was filed more than two years after the date of the injury. A demurrer filed to this declaration was sustained as to the first, second, third, and fifth counts, and overruled as to the fourth count. Thereafter plaintiff in error filed a plea of general issue and a special plea of the statute of limitations to the fourth count. Defendant in error demurred to said special plea, and the demurrer was sustained. Plaintiff in error elected to abide by such plea, and the case was tried solely on the fourth count of the amended declaration. This alleged, generally, as did the second count of the original declaration, common-law negligence. The principal question involved here is as to whether the fourth count was a mere restatement, in better form, of the same cause of action stated in the second count of the original declaration.

It seems to be conceded by counsel for plaintiff in error that, if the fourth count of the amended declaration is merely a restatement of the cause of action, then the demurrer to the fourth count was properly overruled; but it is earnestly argued that the second count of the original declaration did not state a cause of action. That count, after alleging the ownership and operation of the coal mine by plaintiff in error and the employment of defendant in error therein, further alleged that on November 18, 1914, defendant in error was engaged as an employee of plaintiff in error in loading coal in room 46 of the mine; that on that day the coal in the roof of room 46 was loose and likely to fall and injure persons working therein, all of which facts plaintiff in error knew or could have known by the exercise of ordinary diligence; that therefore it became and was the duty of plaintiff in error on said date to notify defendant in error that the coal in the roof was loose and likely to fall and injure persons working in said room; and that plaintiff in error did not regard its duty in that behalf, but, on the contrary, negligently and carelessly permitted defendant in error to load coal in said room without knowledge of the dangerous condition, whereby he was struck and injured, etc.

[1-4] It is the duty of an employer to use reasonable care to provide an employee a reasonably safe place in which to work. Metcalf Co. v. Nystedt, 203 Ill. 333, 67 N. E. 764. It is not sufficient to allege in the declaration that it is the duty of the defendant to do certain things, as that would be but the averment of a conclusion; but the declaration must state facts from which the law will raise the duty. McAndrews v. Chicago, Lake Shore & Eastern Railway Co., 222 Ill. 232, 78 N. E. 603; Bahr v. National Safe Deposit Co., 234 Ill. 101, 84 N. E. 717. The duty, if any exists, must arise from the facts stated. Said count 2 alleged the ownership and operation of the mine by plaintiff in error; that defendant in error was employed by plaintiff in error and was engaged as its servant in loading coal in room 46; that the roof of said room was in a dangerous condition; that plaintiff in error knew of such dangerous conditions, or could have known the same by the exercise of reasonable care; and that it also knew that defendant in error as such servant, was engaged in loading coal in said room. Here we find allegations of fact sufficient to impose upon plaintiff in error the legal duty to use reasonable care, on the day in question, to provide defendant in error with a reasonably safe place in which to work. The count further alleges that plaintiff in error negligently and carelessly permitted defendant in error to load coal in said room after knowledge on its part of the dangerous condition; that

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defendant in error sustained injuries on account of the negligence of plaintiff in error. This court has stated that in actions of this character it is necessary to allege and prove, in order to make out a case, three things: (1) The existence of a duty on the part of defendant to protect the plaintiff from the injury of which he complains; (2) the failure of the defendant to perform that duty; and (3) an injury to plaintiff resulting from such failure Bahr v. National Safe Deposit Co., supra, and cases there cited. These three elements were averred in the second count of the original declaration. The fourth count of the second amended declaration is a statement of the same condition of facts, but without the surplusage that is conceded by all parties was a part of the second count of the original declaration. It is the settled doctrine of this court that if an original declaration is filed in apt time, stating a cause of action, though imperfectly and defectively, subsequent amendments, though filed after the statute of limitations has run, will not be barred thereby if they amount to no more than a restatement, in a different or better form, of the cause of action originally declared on. Swift Co. v. Gaylord, 229 Ill. 330, 82 N. E. 299; St. Louis Merchants' Bridge Railway Ass'n v. Schultz, 226 Ill. 409, 80 N. E. 879; McInerney v. Western Packing Co. 249 Ill. 240, 94 N. E. 519; Vogrin v. American Steel Co., 263 Ill. 474, 105 N. E. 332.

[5] Counsel for plaintiff in error further argues that the trial court erred in refusing three instructions requested by plaintiff in error. These instructions, as we read them, in substance advised the jury that if defendant in error knew of the dangerous condition of the roof he could not recover, and by them the defendant would be given the benefit of the doctrine of assumed risk as a defense in this case. The declaration averred, and it was expressly stipulated on the trial, that plaintiff in error had elected not to accept the provisions of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). Having elected not to accept the provisions of that act, plaintiff in error waived its right to interpose the common-law defense of assumed risk. Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304; Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713. Under these authorities, the instructions were therefore properly refused. For the same reason plaintiff in error was not entitled to a peremptory instruction in its behalf on the ground that defendant in error had assumed the risk.

[6] Counsel for plaintiff in error further argues that the trial court erred in refusing to give a peremptory instruction on its behalf. The only negligence charged in the fourth count, on which the case was tried, was that plaintiff in error negligently permitted defendant in error to work under a dangerous roof. This was the only question of fact to be determined by the jury. No evidence was offered by plaintiff in error. Defendant in error and two witnesses testified to the dangerous condition of the roof for one or two days prior to the accident, and another witness testified to its condition after the accident. The evidence on behalf of defendant in error warranted the verdict on the question of negligence, and the peremptory instruction was therefore properly refused.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

WABASH RY. CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12274.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT— EVIDENCE.

Evidence *held* to show that an injury to a servant which developed into tuberculosis of the bones was one arising in the course of his employment; the fact that the servant was predisposed to that affliction not changing the result.

(For other cases. see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE.

Notice of injury suffered by a watchman at railway shops given to the foreman or superintendent of the shops *held* sufficient notice under the Workmen's Compensation Act to charge the railroad company.

(For other cases, see Master and Servant, Dec. Dgi. § 398.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SETTLEMENTS.

Though the receipt and release given at the time a servant made settlement for injuries did not mention the Workmen's Compensation Act, *held* that, as the employer was operating under the act, it must be deemed the settlement was made under the act; for it would be contrary to purpose of the act to allow such an employer to relieve itself in that manner from further liability.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

4. MASTER AND SERVANT—COMPENSATION—REVIEW—TIME FOR FILING PETITION.

A settlement made between a master and an injured servant *held* one contemplated by Workmen's Compensation Act, § 19 (h), so petition to review on account of the recurrence of the injury might be filed within 18 months.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

5. COMMERCE — "INTERSTATE COMMERCE" — RAILROADS—WATCHMAN IN SHOP.

A watchman of railroad shops where engines used in interstate commerce were repaired *held* not engaged in "interstate commerce" so an action for injuries would not be governed by the federal Employers' Liability Act (U. S. Comp. 1916, §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[5].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"TOTAL DISABILITY."

Under Workmen's Compensation Act, § 8 (e), defining total disability as the loss of both arms or legs or any two of them, and in view of

* Decision rendered, Dec. 18, 1918. Rehearing denied, Feb. 6, 1919. 121 N. E. Rep. 569

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paragraph (f), relating to compensation, *held* that, where a servant who had already lost an arm suffered the loss of a leg, there was a total disability; for the employer hired the servant as one able only to do the work of one-armed man, and compensation would be based on the amount paid.

(For other cases, see Master and Servant, Dec. Dig. § 385[5].)

(For other definitions, see Words and Phrases, First and Second Series, Total Disability.)

Error to Circuit Court, Macon County; Wm. K. Whitfield, Judge.

Application by Claude Williams under the Workmen's Compensation Act for compensation for injuries received while in the employ of the Wabash Railway Company. The decision of the Industrial Commission was modified by the circuit court, and the Railway Company brings error. Affirmed.

Crea, Housum & Hamilton, of Decatur (J. L. Minnis, of St. Louis, Mo., and N. S. Brown, of counsel), for plaintiff in error.

Fannie A. Bivans, of Decatur, and Le Forgee, Black & Samules, of Chicago, for defendant in error Williams.

COOKE, J. This is a writ of error by the Wabash Railway Company to to review the judgment of the circuit court of Macon county modifying the decision of the Industrial Commission awarding compensation to Claude Williams for disability resulting from an injury which he received while in the employ of plaintiff in error.

Williams was employed by plaintiff in error as a night watchman in its shops in the city of Decatur. Previous to his employment in this capacity he had suffered the loss of his left arm by amputation near the shoulder. Williams' dutes required him to take care of the locomotive shop and the storeroom. Another night watchman had charge of the blacksmith shop. On the night of April 3, 1916, the man who watched the blacksmith shop was not on duty. There is evidence in the record tending to show that Williams was required, in the performance of his duties on that night, to go from the locomotive shop or storeroom to the blacksmith shop. While returning from the blacksmith shop he stumbled over a pile of scrapiron, fell, and injured his left knee. The knee became so painful that Williams was compelled to quit his work. He delivered his keys to a fellow workman, and was taken to the Wabash Employees' Hospital, where he remained until June 29th following. Williams' keys were the following morning delivered to the foreman of the Wabash shops, who was informed of the injury to Williams, and who employed a man on that day to take his place. On July 20, 1916, Williams settled with the claim agent of plaintiff in error for the injury upon the theory that he had then fully recovered, was paid the sum of $145, and gave his receipt therefor. This receipt contained a full satisfaction, release, and discharge of all claims which Williams had against plaintiff in error on account of the injury which he had received on April 3d. Williams thereafter returned to his work as night watchman, and was so employed until the month of October, when the injury recurred. He was again taken to the Wabash Employees' Hospital. Tuberculosis of the bone set in as a result of the injury, and Williams' leg was amputated about six inches below the hip joint on April 4, 1917.

On October 25, 1917, Williams filed a petition under paragraph (h) of section 19 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 144), to review the agreement made between him and plaintiff in error on July 20, 1916. On December 28, 1917, the commission rendered its decision allowing Williams the sum of $6 per week for a period of 175 weeks for the total loss of his leg and the sum of $6 per

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week for a further period of 48 weeks for temporary total disability. Upon writ of certiorari the circuit court of Macon county modified the decision of the Industrial Commission, and Williams was allowed to recover the sum of $2,400, to be paid at the rate of $6 per week, commencing April 5, 1916, at the expiration of which time he was allowed a pension at the rate of $16 per month during the remainder of his lifetime; the plaintiff in error being given credit for the sum of $145 already paid to Williams.

[1] The evidence clearly discloses that the disability of Williams was the result of an injury arising out of and in the course of his employment. The fact that Williams may have been predisposed to tuberculosis of the bones does not affect the result, as the evidence shows that the tuberculosis of the left knee developed as a result of the injury.

[2] It is contended that the Industrial Commission did not have jurisdiction. The notice to the foreman or superintendent of the shops that Williams had been injured was sufficient notice under the statute, as he was the agent of the plaintiff in error. Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976.

[3, 4] While the receipt and release given at the time of the settlement of July 20, 1916, made no reference to the Workmen's Compensation Act, this was clearly a settlement or agreement made under the act. It is true that the provisions of the act were not followed in making this settlement, as Williams was receiving for his services $50 per month, and under this settlement he was paid in full for the time lost. Plaintiff in error was operating under the act, and any settlement or agreement made with an injured employee must be considered as having been made under the act, whether so expressly stated or not. It is contrary to the policy of the act to allow an employer, while choosing to come under its provisions by not filing an election in writing to the contrary, to relieve himself from liability under the act by private agreement or contract with the employee. Chicago Railways Co. v. Industrial Board, 276 Ill. 112, 114 N. E. 534. This was such an agreement as is contemplated by paragraph (h) of section 19 of the act, and as the petition for review was filed with the commission within 18 months after the agreement was entered into, the applicant was properly allowed to show that his disability had recurred subsequent to the making of the agreement. Arnold & Murdock Co. v. Industrial Board, 277 Ill. 295, 115 N. E. 137.

[5] It was shown that plaintiff in error was engaged in the business of interstate commerce, and it is contended that at the time of his injury Williams was also so engaged, and that the federal act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]), and not the Illinois act, applied. Dead engines were brought into the shops of plaintiff in error and repaired. While it is true that these engines had been in both intrastate and interstate traffic, their repair had no direct connection with such traffic, and defendant in error, when performing his duties as watchman in those shops was not engaged in interstate commerce. Chicago, Rock Island & Pacific Railway Co. v. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916F, 540.

[6] The principal contention made by the plaintiff in error is that the circuit court erred in holding that it was liable to pay compensation for a total and permanent disability. The basis of this contention is that the loss of one leg does not constitute total permanent disability. Defendant in error, Williams, contends, on the other hand, that the loss of his left leg, combined with the previous loss of his left arm, constitutes total permanent disability, and that the judgment of the circuit court is correct. This precise question has not arisen before in this state. It has arisen in other jurisdictions under compensation acts similar to our act. In Massachusetts and New York it has been held that under such circumstances the disability occasioned is total and permanent. In re Branconnier, 223 Mass. 273, 111 N. E. 792; Schwab v. Emporium Forestry Co., 216 N. Y.

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712, 111 N. E. 1099. The Michigan court takes the contrary view. Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B, 1276, Ann. Cas. 1917E, 238. Paragraph (e) of section 8 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 133) provides that the loss of both hands or both arms, both feet, both legs, both eyes, or any two of them, shall constitute total and permanent disability, for which compensation shall be paid according to paragraph (f). Paragraph (f) is as follows:

"(1) In case of complete disability, which renders the employee wholly and permanently incapable of work, compensation equal to fifty per centum of his earnings, but not less than $6 nor more than $12 per week, commencing on the day after the injury and continuing until the amount paid equals the amount which would have been payable as a death benefit under paragraph (a), section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving, as provided in said paragraph (a), section 7, and thereafter a pension during life annually equal to eight per cent. of the amount which would have been payable as a death benefit under paragraph (a), section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving, as provided in said paragraph (a), section 7. Such pension shall not be less than $10 per month and shall be paid monthly."

We are disposed to follow the reasoning of the Massachusetts court construing a statute quite similar to ours, and hold that this act applies where the loss of one of the members mentioned occurred previous to the employment, and the loss of the other occurred as the result of an injury arising out of and in the course of the employment. This, in our opinion, is the fair intent and meaning of the act. When Williams was employed by plaintiff in error, he had lost his left arm, and his capacity for work was to that extent impaired. He was employed to do work which could be performed by a man having but one arm, and he was paid upon that basis. By the loss of his leg such capacity as he had for work was entirely destroyed, and under the provisions of the act he was entitled to compensation for total permanent disability. Such a construction of the act works no hardship upon plaintiff in error. Williams was employed and paid as a man of limited capacity, and the compensation which plaintiff in error is required to pay is based upon the wages it was paying him as a man of limited capacity.

The judgment of the circuit court is affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

WANGEROW

v.

INDUSTRIAL BOARD ET AL. (No. 12305.)*

1. COMMERCE—EMPLOYERS' LIABILITY—STATUTE APPLICABLE.

The federable Employers' Liability Act applies, and there is no liability under the state Workmen's Compensation Act, if employee at time of injury was engaged in interstate commerce.

(For other cases, see Commerce, Dec. Dig. § 8[6].)

2. COMMERCE—EMPLOYERS' LIABILITY—INJURY IN "INTERSTATE COMMERCE."

A member of a switch engine crew, killed in the movement of the engine, without cars, going from setting one train, containing interstate cars, to move another train, also containing interstate cars, was engaged in "interstate commerce"; the immediate purpose of the work controlling.

(For other cases, see Commerce, Dec. Dig. § 27[7].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Mary Wangerow against the Chicago Junction Railway Company. Certiorari to review the decision of the Industrial Board denying an award was quashed by the circuit court, and applicant brings error. Affirmed.

James C. McShane, of Chicago, for plaintiff in error.

Winston, Strawn & Shaw, of Chicago (John D. Black and George A. Kelly, both of Chicago, of Counsel), for defendant in error.

STONE, J. This cause comes to this court by writ of error to review the judgment entered by the circuit court of Cook county affirming a finding of the Industrial Board of Illinois and quashing a writ of certiorari directed to that board to review its decision denying an award to the plaintiff in error under the Workmen's Compensation Act of Illinois (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). The trial judge certified that the case was one proper to be reviewed by this court.

The Industrial Board found, and it is admitted, that the defendant in error the Chicago Junction Railway Company and the deceased, William Wangerow, were operating under the Workmen's Compensation Act, and that the injuries of the deceased, causing his death, arose out of and in the course of his employment. The deceased lived with the plaintiff in error, who is his widow, and to whose support he contributed. Compensation was denied by the Industrial Board and the circuit court on the ground that the defendant in error and the deceased were at the time of the injury engaged in interstate commerce, and for that reason the rights and interests of the parties are governed by the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916,

* Decision rendered, Dec. 18, 1918. Rehearing denied, Feb. 13, 1919. 121 N. E. Rep. 724.

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§§ 8657-8665), and not by the Workmen's Compensation Act of Illinois.

The Chicago Junction Railway Company operates a railroad situated entirely within this state and devoted exclusively to switching cars. Its chief activities are performed at and within the vicinity of the Union Stockyards, in Chicago. It serves the various packing houses and other industries in that vicinity, employing from 30 to 35 switch engines and crews in its work. Deceased was a member of one of these crews. For operating purposes the yards are divided into a number of so-called switching districts. Each district has a yardmaster in charge, and over the yardmasters of all the districts there is a general yardmaster. Telephone communications are maintained between the various districts and the general yardmaster's office. The switching districts mentioned by the witnesses and more or less concerned in this case were, first, the Ashland avenue district, which extended from Ashland avenue westward for about a mile and included the Ashland avenue yard; the Horn district, which was situated in the stockyards proper; the Halsted street district, which was situated about a mile east of Ashland avenue; and the so-called State Line district, which was also situated about a mile east of Ashland avenue. All of the switch engines and crews, except 3, were engaged in switching or transferring cars between the various switching districts. The 3 engines and crews referred to were called "roustabout," "shove-down," and "pusher" engines and crews. One of the 3 engines was No. 157, and deceased was one of the switchmen of the crew that worked with this engine. The crew in which the deceased worked commenced their day's work at 7 o'clock a. m.

While there is conflict in the testimony, it is quite apparent from the evidence in the record that there was a standing general order of the yardmaster to the effect that the crew in which the deceased worked was to go on duty at 7 o'clock each morning; that unless they had orders to the contrary their first act was to take a cut of cars from track 20 over to the Horn district; that these cars were ready at 7 o'clock each morning; that when this crew made the delivery from track 20 into the Horn district, it brought back on its return trip any cars destined to other parts of the yard, and unless otherwise directed would then go around to the west end of the Ashland avenue yard and come in on track No. 13, where a train for the Halsted street district was usually found ready. This train consisted of cars for the different industries in the Halsted street district. There was a general order to next move this train to the Halsted street district, cutting off from them at Laurel street. This was the regular daily work of this crew, unless otherwise ordered by the yardmaster. After returning from the Halsted street district the next work of this crew was to take another train from track 14 or 17 to the State Line district, distributing them in that district. The switching, as above indicated usually took the entire time of the crew until about 11 o'clock in the morning, after which the crew went back to the Ashland avenue yard and worked the balance of the day under special orders.

On the morning of the accident this crew started to work as usual at 7 o'clock a. m. and their first act of switching was to shove a train out of track 20 and into the Horn district. At the direction of the yardmaster in the Horn district the engine on which this crew worked was cut off and returned to the Ashland avenue yard, where the crew got another train from track 13 for the Halsted street district, which they took as far as Laurel street. This train, which we will refer to as the Laurel street train, was left at Laurel street as a part of the regular morning work, and not in compliance with any special directions from the yardmaster. Upon cutting loose from the Laurel street train this engine and crew started back to the Ashland avenue yard to get another train to take to the State Line district. This train we will, as a matter of convenience, refer to as the State Line train. This was also a part of the regular morning work of this crew. The accident occurred while

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this engine and crew were returning, after setting the Laurel street train, to the Ashland avenue yard for the purpose of moving the State Line train. After the accident this engine and crew proceeded to the Ashland avenue yard, took the State Line train and moved it as far as Laurel street on a track used for moving the State Line train. While returning from setting the Laurel street train this engine, without cars attached, stopped at a water tank and took water, and thereafter, on the way to the Ashland avenue yard, deceased fell from the footboard on the front of the engine while going over the cross-over tracks, and the engine passed over one of his limbs, inflicting the injuries from which he died. The course taken from the Halsted street district, in which the Laurel street train was left, to Ashland avenue on this occasion was the one usually followed in this work.

It is stipulated in the record that on the morning of the accident the train of cars herein referred to as the Laurel street train had in it freight cars which were moving in interstate shipment, and that the tain herein referred to as the State Line also had in it freight cars which were moving in interstate shipment and loaded with interstate commerce.

It is contended by the plaintiff in error that the deceased was engaged in a succession of separate tasks and was not connected with interstate commerce, except at such times as the crew with which deceased worked was in actual contact with a drag of cars in which there was interstate commerce or a car moving in interstate shipment; that, even admitting that there was a general plan or order of work for the crew with which the deceased worked from 7 o'clock to 11 o'clock a. m. of each day, nevertheless its work was properly to be regarded as a succession of separate tasks and in no way connected with interstate commerce, except when the crew moved a drag of cars in which there was interstate commerce or a car moving in interstate shipment. It is contended by the defendant in error, the Chicago Junction Railway Company, that the crew in which the deceased worked was engaged in a regular systematic routine of work; that the series of acts making up the whole of this work from 7 o'clock to 11 o'clock a. m. was properly to be regarded as a single and individual task, and not a succession of separate tasks; that even if it be held that the series of acts making up this work are properly to be regarded as a succession of separate tasks, the particular act in which the deceased was engaged at the time of the injury was a necessary incident to and a part of the work connected with interstate commerce or the moving of cars in interstate shipment.

[1] The question to be decided is whether the Workmen's Compensation Act of Illinois or the federal Employers' Liability Act applies. If Wangerow was engaged in interstate commerce at the time of his injury, then the federal act applies, and there is no liability under the Illinois Workmen's Compensation Act. Chicago, Rock Island & Pacific Railway Co. v. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916F, 540; Staley v. Illinois Central Railroad Co., 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450.

The test whether recovery in any case is governed by the state or the federal act, as established by this court and by the federal courts, is: Is the work in which the employee was engaged at the time of the injury a part of interstate or intrastate commerce? That the employee expected, upon the completion of the task at which he was engaged when injured, to engage in another which would have been interstate or intrastate is immaterial, as the test is the nature of the work done at the time of the injury. Chicago, Rock Island & Pacific Railway Co. v. Industrial Board, supra; Illinois Central Railroad Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914c, 163; Erie Railroad Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; Louisville & Nashville Railroad Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 661 L. Ed. 119.

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[2] Whether the work done is interstate or intrastate depends upon the immediate purpose for which such work is done. In the case of Louisville & Nashville Railroad Co. v. Parker, supra, a railroad fireman on a switching engine was killed in a collision while his engine was transferring an empty freight car from one switch track to another. The car was not being moved in interstate commerce, but the purpose of moving the car, and the only purpose, was to enable the crew to reach and move an interstate car. The fireman was held to be engaged in interstate commerce at the time of the accident; the court there saying:

"If * * * this movement [of an empty freight car] was simply for the purpose of moving and reaching an interstate car, the purpose would control, and the business would be interstate."

In the case at bar the crew of which Wangerow was a member was at the time of the accident moving the engine, with no cars attached, from the work of setting the Laurel street train, containing interstate cars, back toward Ashland avenue for the purpose of there moving the State Line train, also containing interstate cars. In each case the moving of these trains was an act of interstate commerce, and in doing that work Wangerow was engaged in interstate commerce. The only purpose in crossing over the tracks where the injury occurred was to move the engine from the point of completion of one act of interstate commerce to the point of commencement of another act of interstate commerce. That purpose controls, and Wargerow was engaged in interstate commerce at the time of the injury. This being true, the Workmen's Compensation Act of Illinois did not apply.

The judgment of the circuit court affirming the order of the Industrial Board and quashing the writ of certiorari will be affirmed.

Judgment affirmed.

APPELLATE COURT OF INDIANA.

DIVISION, No. 1.

ESSINGTON ET AL.

v.

BOWMAN. (No. 10241.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DECISIONS APPEALABLE—STATUTE.

Under Workmen's Compensation Act, § 61, as amended by Acts 1917, c. 63, providing for appeals from awards of the Industrial Board under the same conditions as govern appeals in ordinary cases, and Burns' Ann. St. 1914, §§ 1389, 1391, declaring no appeal shall be taken where the amount in controversy does not exceed $50, with certain exceptions, no appeal from an award of $40 will lie; no question being presented involving any of the exceptions.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

Appeal from Industrial Board.

Application by Iva Bowman against John Essington and others for compensation under the Workmen's Compensation Act. From an award of the Industrial Board in favor of the applicant, defendants appeal. Appeal dismissed.

* Decision rendered, Jan. 21, 1919. 121 N. E. Rep. 548.

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R. D. Coburn and Orbison & Olive, all of Indianapolis, for appellants.

BATMAN, P. J. [1-4] This is an appeal from an award by the Industrial Board in favor of appellee for $40. The first question to be determined is one of jurisdiction. It is well settled that the right of appeal is wholly statutory, except where expressly secured by the Constitution. Hall v. Kincaid (1917) 115 N. E. 361. The right of appeal under the Workmen's Compensation Act is not a constitutional right, but purely a statutory one. It is given by section 61 of the Workmen's Compensation Act of 1915 (Acts 1915, c. 106) as amended by the acts of 1917, which reads as follows:

"An award by the full board shall be conclusive and binding as to all questions of fact, but either party to the dispute may, within thirty days from the date of such award, appeal to the appellate court from errors of law *under the same terms and conditions as govern appeals in ordinary civil actions.*" Acts 1917, p. 155. (Our italics.)

One of the terms and conditions governing appeals in ordinary civil actions is found in section 1389, Burns, 1914, which reads as follows:

"No appeal shall hereafter be taken to the Supreme Court or Appellate Court in any civil case where the amount in controversy, exclusive of interest and costs, does not exceed $50.00, except as provided in section 8 of this act."

The exceptions enumerated in said section 8, being section 1391, Burns' 1914, involves questions relating to the validity of a franchise, or of an ordinance of a municipal corporation, or to the constitutionality of a statute, state or federal, or to the proper construction of a statute, or rights guaranteed by the state or federal Constitution. In the event a case falls within one of the exceptions enumerated above, an appeal to the Supreme Court is permitted for the sole purpose of presenting the question involved in the exception, but that court has no power to determine whether the trial court reached a proper conclusion on the merits of the case. Chicago, etc., R. Co. v. Anderson (1914) 182 Ind. 140, 105 N. E. 49, Ann. Cas. 1917A, 182.

In the instant case the amount in controversy, exclusive of interest and costs, is less than $50, and no question is presented involving any of the enumerated exceptions. An appeal is therefore unauthorized. Under such circumstances it is the duty of this court to take notice of its lack of jurisdiction, and dismiss the appeal, notwithstanding the fact that appellee has not raised the question in any form. Schultz v. Alter (1915) 60 Ind. App. 245, 110 N. E. 230.

[5] However, if the amount in controversy was sufficient to give this court jurisdiction, nevertheless a dismissal of the appeal would be warranted. The only question which appellants have attempted to present requires a consideration of the evidence, and the finding of facts based thereon. Appellant's brief does not contain a condensed recital of the evidence in narrative form, or the finding of facts on which the award is based, as required by the rules governing the preparation of briefs. Under these circumstances a dismissal of the appeal is authorized. Perry, etc., Stone Co. v. Wilson (1902) 160 Ind. 435, 67 N. E. 183; State, etc., v. Kesling (1911) 176 Ind. 161, 95 N. E. 428.

For the reasons stated, the appeal is dismissed.

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APPELLATE COURT OF INDIANA.

DIVISION No. 2.

ANSTED SPRING & AXLE CO.

v.

AYRES. (No. 10249.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW OF FINDINGS.

It is the exclusive province of the Industrial Board to weigh the evidence and determine therefrom, in the first instance, whether the injury arose out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW OF FINDINGS.

In proceeding for workmen's compensation, evidence as to manner in which employee was injured *held* such as to permit difference of opinion as to whether the injury arose out of and in the course of the employment, so that findings of board would not be disturbed.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW OF FINDINGS.

In proceeding for workmen's compensation, where evidence as to nature of injury would permit affirmative or negative finding as to whether the injury arose out of and in the course of the employment, the court on appeal must uphold the conclusion of the Industrial Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceeding by Omer Ayres for workmen's compensation, opposed by the Ansted Spring & Axle Company, Employer. From an award of the Industrial Board in favor of employee, the employer appeals. Affirmed.

Taylor, White & Wright and Jos. W. Hutchinson, all of Indianapolis, for appellant.

E. Ralph Himelick, Hyatt L. Frost, and George W. Globe, all of Connersville, for appellee.

DAUSMAN, C. J. The controversy involved in this appeal was before the court in the form of a certified question. In re Ayres, 118 N. E. 386. After receiving the opinion of the court in response to the question then submitted, the Industrial Board made a finding of facts and awarded compensation to the injured employee.

Appellant's only contention is that the workman's injury did not arise out of the employment.

The facts found are substantially the same as the facts submitted with the certified question, and we need not repeat them here. However, for the purpose of explaining the workman's conduct, we deem it advisable to state that the undisputed evidence discloses the following additional facts:

* Decision rendered, Jan. 8, 1919. 121 N. E. Rep. 446.

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The tank containing the boiling acid was in a room through which the employees had to pass "to go outside" the factory. Appellee went through that room frequently each day. Appellee and a fellow workman who was with him, on raising the lid and looking into the tank, were of the opinion that it contained boiling water. This liquid, which they supposed to be water, appeared to be dirty and unfit for washing. Thereupon appellee procured a bucketful of clean, cold, water and lowered it into the tank to warm it.

The tank of acid constituted an insidious danger and potential peril to which employees in that institution were in some degree exposed. The injury sustained by appellee had its origin in conditions of such a nature as would prompt one to conclude, as of first impression, that it arose out of the employment. As against that conclusion, it may be said with much force that the workman stepped so far outside the established custom as to exceed the bounds of reason; and that by his own rash conduct he transformed a latent into an active peril, thereby creating the hazard which resulted in his injury.

[1-3] It is the exclusive province of the Industrial Board to consider and weigh the evidence and determine, in the first instance, whether the injury arose out of and in the course of the employment. In the case at bar we are bound to recognize the fact that men may reasonably differ as to which answer should be made to that question. In other words, either an affirmative or a negative answer would be a legitimate conclusion from the evidence. Under such circumstances, it is our plain duty to uphold the conclusion reached by the board.

The award is affirmed, and by virtue of the statute the amount thereof is increased 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

GALVIN

v.

BROWN. (No. 10451.)*

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ATTORNEY'S FEES—RIGHT TO REVIEW.

Workmen's Compensation Act does not authorize an appeal from the order of the Industrial Board, approving or disapproving attorney's fees.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISMISSAL OF APPEAL.

Where an appeal under the Workmen's Compensation Act from an allowance of attorney's fees is unauthorized, the Appellate Court will dismiss the appeal, although appellee has not raised the question.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

*Decision rendered, Jan. 10, 1919. 121 N. E. Rep. 447.

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5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW—DECISIONS APPEALABLE.

Workmen's Compensation Act, providing for an appeal from an award of the full Industrial Board, does not authorize an appeal from an order awarding attorney's fees, made by two members thereof.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Harry C. Brown. From an order made by part of the Industrial Board fixing attorney's fees in favor of claimant's attorney, George W. Galvin, the latter appeals. Appeal dismissed.

George W. Galvin, of Indianapolis, for appellant.

James W. Noel, Eugene H. Iglehart, and Clinton H. Givan, all of Indianapolis, for appellee.

BATMAN, P. J. The record in this case disclose that apellee, Harry C. Brown, was an employe of Nordyke & Marmon Company; that he received a personal injury by accident arising out of and in the course of his said employment; that he filed an application before the Industrial Board for an adjustment of his compensation because of such injury, which resulted in a final award in his favor against his employer of $11 per week for 100 weeks, beginning May 14, 1917; that afterwards appellee and his employer entered into an agreement, which was approved by the Industrial Board, whereby the latter's liability to appellee for 74 weeks of its compensation liability was redeemed by the payment of $796.89 in a lump sum; that appellant, George W. Galvin, represented appellee as his attorney in said proceedings; that some time after the adjustment and payment of said compensation appellee filed a petition before the Industrial Board asking that it fix the attorney fee due his said attorney for the services rendered by him in said matter; that appellant entered his special appearance to said petition, and filed a plea in abatement; that afterward appellee's said petition and appellant's said plea in abatement were submitted to two members of the Industrial Board, who heard the evidence and took the cause under advisement; that said two members of the board subsequently overruled appellant's plea in abatement, and made a finding of facts, and entered an order, whereby the fee of appellant for services rendered appellee in the prosecution of his said claim for compensation was fixed and approved at the sum of $88, and appellant was ordered to return to appllee all moneys received and retained by him in excess of said sum; that appellant thereafter filed his petition for a rehearing, and asked an order, setting aside and vacating the order theretofore made by the board, relating to his said attorney fee; that appellant presented his said petition in person to a single member of said board, and requested that he act thereon; and that said member, after considering said petition and being duly advised, overruled the same. Appellant is now attempting to prosecute an appeal from the order made by the two members of the board, relating to his said attorney fee. Appellee has filed a motion to dismiss the appeal on the ground that this court has no jurisdiction to hear and determine the same, because the record fails to show an award by the full Industrial Board.

[1, 2] In determing an appeal the question of jurisdiction is always of primary consideration. It is well settled that the right of appeal is wholly statutory, except where expressly secured by the Constitution. Hall v. Kincaid (1917) 115 N. E. 361. The right of appeal under the Workmen's Compensation Act is not a constitutional right, but a purely statutory one. The only provision of said act, which confers any authority on the Industrial Board with reference to attorney fees is found in section 65, which reads as follows:

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"Fees of attorneys and physicians and charges of hospitals for services under this act shall be subject to the approval of the board." Acts 1915, p. 412.

It is apparent that this section gives the board power to approve fees of attorneys for services rendered an employe in the prosecution of his claim for compensation, but the question arises as to whether such approval is subject to review by this court on appeal. We must look to the act itself for a determination of this question. The only section of the act conferring the right of appeal from the action of the Industrial Board is No. 61, as amended by the Acts of 1917. Acts 1917, p. 155. In order to determine the scope of the right thereby conferred, we must consider it in connection with certain of the preceding sections. Section 57, as amended by the act of 1917, provides that:

"If after seven days from the date of the injury or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this act, a memorandum of the agreement in the form prescribed by the Industrial Board shall be filed with the board," etc. Acts 1917, p. 228.

Section 58 provides that:

"If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this act * * * either party may make an aplication to the Industrial Board for a hearing in regard to the matters at issue and for a ruling thereon." Acts 1915,

Said section 58, and sections 59 and 60 as amended by the act of 1917, provide for the manner of such hearing, for an award in pursuance thereof, and for a review of the same when made by less than all the members thereof. Acts 1917, p. 154. Section 61 then follows, and provides that: p. 410.

"An award by the full board shall be conclusive and binding as to all questions of fact, *but either party to the dispute may*, within thirty days from the date of such award, appeal to the Appellate Court for errors of law under the same terms and conditions as govern appeals in ordinary civil actions." Acts 1917, p. 155. (Our italics.)

[3, 4] It is quite apparent that the dispute to which reference is made in said section is the difference between the employer and injured employee, arising from a failure to agree as provided in said section 58. The act nowhere makes any express provision for an appeal from an order approving or disapproving attorney fees, and we fail to find any provision from which any such right can be properly implied. Certainly a provision for an appeal from an award growing out of a disagreement between an employer and an injured employee with reference to the latter's compensation, cannot be so construed as to imply the right of appeal in a collateral matter based on the action of the board in approving or disapprovnig attorney fees, which must necessarily arise out of an express or implied contract, between the injured employee and his attorney. The two matters are so far unrelated as to forbid such an implication. We therefore conclude that there is no authority for an appeal from an order of the Industrial Board, approving or disapproving attorney fees. Having reached this conclusion, it is our duty to dismiss the appeal, although appellee has not raised the question in any form. Schultz v. Alter (1915) 60 Ind. App. 245, 110 N. E. 230.

[5] But even if the law were otherwise with reference to the question we have been considering, we would still be compelled to dismiss this appeal on the ground stated by appellee. The statue only provides for an appeal from an award by the full board. Acts 1917, p. 155. The record in this case fails to disclose any award from the full Industrial Board, and hence an appeal is unauthorized.

For the reasons stated the appeal is dismissed.

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APPELLATE COURT OF INDIANA.

DIVISION No. 2.

GREAT LAKES DREDGE & DOCK CO.

v.

TOTZKE ET AL. (No. 10314.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES ARISING OUT OF THE EMPLOYMENT.

In proceeding for workmen's compensation, facts surrounding accident held to warrant conclusion that the workman's injury and death arose out of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —PROCEEDING—DUTIES OF INDUSTRIAL BOARD.

It is the exclusive province of the Industrial Board to consider testimony in a proceeding for workman's compensation and give it such weight as in the judgment of the board is proper.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

"Injury arising out of and in the course of employment" includes injuries to employees whose services are being performed about the premises of the employer, and at places where their employer's business requires their presence, and subjects them to dangers incident to the business.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —EFFECT OF INTOXICATION.

Though a workman's injury arose out of the employment, there can be no award of compensation, where his injury and death were due to his intoxication, in view of Workmen's Compensation Act, § 8.

(For other cases, see Master and Servant, Dec. Dig. § 381.)

Appeal from Industrial Board.

Proceeding by Anna Totzke and others for workman's compensation for the death of Anton Totzke, deceased, opposed by the Great Lakes Dredge & Dock Company, employer. From an award of the Industrial Board in favor of applicant, the employer appeals. Affirmed.

W. J. Whinery, of Chicago, Ill., for appellant.
Joseph J. Sullivan, for appellees.

DAUSMAN, C. J. For about 25 years one Anton Totzke was in the employ of appellant as a workman. On April 25, 1918, he came to his death under the circumstances hereinafter stated. His widow and minor

* Decision rendered, Jan. 31, 1919. 121 N. E. Rep. 675.

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child, as sole dependents, applied to the Industrial Board for an award of compensation. Answer in two pararagraphs: (1) General denial; and (2) that the injury which caused the workman's death was due to his intoxication. The board heard the evidence and made an award. Appellant contends: (1) That the workman's death did not arise out of the employment; and (2) that it was due to his intoxication.

[1] In this finding the board included the following facts:

"On and prior to the 24th day of April, 1917, the Inland Steel Company was a corporation owing and operating a steel plant at Indiana Harbor, in Lake county, Ind. The plant of said Inland Steel Company covered a very large tract of ground, the exact size of which is not shown by the evidence. At said time and prior thereto the plant of the said Inland Steel Company was inclosed by a fence. On said date and prior thereto the Great Lakes Dredge & Dock Company, under contract with the Inland Steel Company, was engaged in driving piles on the Lake Michigan front of the plant of the Inland Steel Company and within the inclosure of the Inland Steel Company. The employees of the Great Lakes Dredge & Dock Company at said time were admitted to the plant of the Inland Steel Company upon cards or passes issued to them by the Great Lakes Dredge & Dock Company. Said employees were required to enter the Inland Steel Company inclosure at a gate known as the Baltimore avenue gate. Only the employees of the Great Lakes Dredge & Dock Company and automobiles and other vehicles were admitted at said gate at said time. On the 24th day of April, 1917, one Anton Totzke was in the employment of the Great Lakes Dredge & Dock Company at an average weekly wage of $21.80, and at said time he was employed by the Great Lakes Dredge & Dock Company in the work of driving piles and constructing a foundation for the said Inland Steel Company at the point hereinbefore designated. Within the inclosure of the Inland Steel Company there is a network of railroad tracks, the exact number of which is not shown by the evidence. From the Baltimore avenue gate of the Inland Steel Company a stone and cinder road, for the use of vehicles and pedestrains, leads to the west across many of the railroad tracks in the Inland Steel Company plant, a distance of about one-half a mile, and this road is the proper route over which the employees of the Great Lakes Dredge & Dock Company should pass from the Baltimore avenue gate in proceeding from said point to the point where the Great Lakes Dredge & Dock Company was driving its piles and constructing the foundation hereinbefore mentioned. On the evening of the 24th of April, 1917, the said Anton Totzke, in company with two other employees of the Great Lakes Dredge & Dock Company, appeared at the Baltimore avenue gate of the Inland Steel Company and presented their passes to the gatekeeper, an employee of the Inland Steel Company, and were admitted into the plant of the said Inland Steel Company. The three employees proceeded westward upon said highway a short distance, the exact length of which is not shown by the evidence, to a track upon which was a locomotive engine of the Illinois Central Railroad Company, which had been leased to the Great Lakes Dredge & Dock Company, and at said point the two employees, who were in company with the said Anton Totzke, boarded said engine and rode from said point to the point where the Great Lakes Dredge & Dock Company was driving this piling and constructing the foundation as hereinbefore mentioned. When said two employees boarded the said locomotive, the said Anton Totzke was standing in the highway filling his pipe, and from said point the said Anton Totzke proceeded westward upon the roadway hereinbefore mentioned, and on his way to his work at the point where the Great Lakes Dredge & Dock Company was driving piling and constructing the aforesaid foundation. While traveling westward on said road, and when passing over the point where one of the railroad tracks crosses said road, the said Anton Totzke was struck by a locomotive, or by the cars attached thereto, switch-

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ing upon said railroad track, and was dragged back toward the Baltimore avenue gate, and in said collision his skull was fractured, three ribs were broken, and both his legs were severed below the knee joints. At the time Anton Totzke entered the plant of the Inland Steel Company on April 24, 1917, at the Baltimore avenue gate, there were nine standard gauge locomotive engines and two narrow gauge locomotive engines switching backward and forth upon said railroad tracks and across the highway upon which the said Totzke was traveling, and in traveling from the said Baltimore avenue gate to the point where he was to perform his work for the Great Lakes Dredge & Dock Company, he was necessarily exposed to the danger of being struck by said locomotive engines at the points where said railroad tracks crossed said road."

The evidence tends fairly to support the facts above stated. Indeed there is little, if any, conflict in the evidence with reference to any of said facts. That the workman's injury which resulted in his death arose out of his employment is a legitimate conclusion to be drawn from said facts.

[2, 3] Counsel for appellant contends that there is undisputed evidence showing that before the accident the workman was seen going westward toward the particular spot where his work was to be performed, and soon thereafter was seen retracing his steps eastward toward the place where he was found after the accident; that the only inference that can be drawn from the evidence on this point is that he was proceeding eastward with the intention of going out of the plant of the Inland Steel Company for some purpose wholly his own and in no way connected with the employment; and that therefore, the ultimate conclusion must be that his injury and death did not arise out of the employment. The testimony of the witness Mr. Anderson tends to prove what counsel claim it does prove, and, in the sense that no other witness testified that Mr. Anderson did not see what he claims to have seen, Mr. Anderson's testimony is undisputed. But the testimony of a witness may be so inherently weak as to be unable to stand against the facts shown by other evidence and the inference to be drawn therefrom; or it may be so inconsistent with other facts and circumstances as to have little or no weight; or it may be so inherently improbable that it amounts to mere conjecture. It was the exclusive province of the Industrial Board to consider Mr. Anderson's testimony in connection with all the other evidence, and to give it such weight as in the judgment of the members of the board was fairly attributable thereto. In that respect we cannot disturb the acting of the board; for there are many facts and circumstances in evidence which are inconsistent with his testimony. Furthermore, if it were conceded that when the accident occurred the workman was going eastward, away from the particular point where his work was to be performed, that fact would not necessarily defeat an award.

[4] In all these cases the question whether the injury or death arises out of and in the course of the employment does not depend on the minute details of what the workman was doing at the time of the accident, or how he was doing it, or whether he was in any manner at fault. It depends rather on the broader and simpler question whether the injury or death was due to a hazard to which the workman would not have been exposed, apart from the business in which he was employed. See Dow's Case (Mass.) 121 N. E. 19. The Workmen's Compensation Law of the state of Iowa (Acts 35th Gen. Assem. c. 147, § 17 [e] contains the following declaration:

"The words 'personal injury arising out of and in the course of such employment' shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business."

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There is much sense and wisdom in this legislative interpretation of a group of words which has caused the courts no end of trouble. It will be observed that the idea of place is the controlling feature of this interpretation, and we approve and adopt it. When Totzke entered the inclosure of the Inland Steel Company undoubtedly he was in a place where his employer's business required him to be, and so long as he remained in that place he was exposed to certain inherent dangers to which he would not have been exposed apart from the business of his employer. By one of the inherent hazards of that place he was fatally injured, and the Industrial Board was justified in finding that the injury which resulted in his death arose out of the employment.

]5[Was the workman's injury which resulted in his death due to his intoxication? If so, there can be no award even though his death arose out of the employment. Section 8, W. C. A. On this point the board made the following finding:

"The said Anton Totzke was not intoxicated at the time of his injury, and his injury and death were not due to his intoxication."

The most that can be said in favor of appellant's contention that the workman was intoxicated at the time of the accident is that the evidence relating thereto is conflicting.

The award is affirmed, and by virtue of the statue the amount thereof is increased 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

HEGE & CO. ET AL.

v.

TOMPKINS ET AL. (No. 10415.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COURSE OF EMPLOYMENT—BURDEN OF PROOF.

In a proceeding under Workmen's Compensation Act the burden rests upon the servant to show facts from which the conclusion may be properly drawn that the injuries were caused by an accident arising out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW—QUESTION OF FACT.

The finding of facts by the industrial board stands on the same footing as the finding of the trial court or the verdict of a jury, and, when sustained by competent evidence, is conclusively binding on the appellate court.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—PROCEEDINGS BEFORE INDUSTRIAL COMMISSION—EVIDENCE.

The industrial board may draw reasonable inferences from the facts and circumstances in evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

*Decision rendered, Jan. 28. 1919. 121 N. E. Rep. 677.

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5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RULES OF PROCEDURE.

Under Workmen's Compensation Act, § 55, providing that the industrial board may prescribe its own procedure, which shall be "as summary and simple as reasonably may be," the board is not bound by the technical rules of court procedure in civil actions, including those relating to hearsay evidence.

(For other cases, see Master and Servant, Dec. Dig. § §§ 404, 414.)

6. MASTER AND SERVANT—INDUSTRIAL BOARD—INCOMPETENT EVIDENCE—REVERSAL.

The admission of incompetent evidence by the industrial board will not operate to reverse an award if there be any basis in the competent evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—HEARSAY EVIDENCE—OBJECTIONS.

In a proceeding before the industrial board it is necessary that a party object to hearsay evidence in order to overcome the presumption that he consented to its admission and consideration.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REPORT OF ACCIDENT—ADMISSIBILITY.

In a proceeding before the industrial board the master's report filed pursuant to Workmen's Compensation Act, § 67, showing the character of the injury, and that it was within the scope of employment, is admissible as a statement by the party primarily liable, notwithstanding its ex parte character, and is not within the hearsay rule.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REPORT OF ACCIDENT—VOLUNTARY STATEMENT.

A master's report of an accident made to the industrial board pursuant to Workmen's Compensation Act, § 67, requiring it to be made on a blank prepared by the board, must be held a voluntary statement by the master's adoption of the printed portion, where not accompanied by other explanation.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

11. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REPORT OF ACCIDENT—ADMISSIBILITY.

An admission by a master in report to the industrial board that servant was injured in a particular manner in the course of his employment is admissible, although the master based such report upon hearsay evidence.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

12. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REPORT OF ACCIDENT—ADMISSIBILITY.

The provisions of the Workmen's Compensation Act, § 56, that "these reports shall not be used as evidence against an employer in any suit at law brought by an employee for the recovery of damages," referring to master's report of accident, does not prohibit the use of such reports as evidence in proceedings before the board for an award.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

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13. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS—EVIDENCE.

An unimpeached report of master to the industrial board, stating manner of the accident and injury to servant, and that the same was within the scope of the servant's employment, together with other evidence, *held*, sufficient to sustain the industrial board's award.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Adra M. Tompkins, widow of Howard Tompkins, deceased, and the deceased's dependent children, opposed by Hege & Co., employer, and the Fidelity & Casualty Company of New York, insurer. From an award, after review by full board of an award made by one member thereof, the employer and insurer appeal. Affirmed, and increased by 5 per cent. by virtue of Acts 1917, c. 63.

Taylor, White & Wright, of Indianapolis, for appellants.

Marshall Hacker and Frank S. Jones, both of Columbus, for appellees.

BATMAN, P. J. Appellees, who are the widow and children of Howard Tompkins, deceased, filed their application before the industrial board, alleging that they were dependents of said decedent, and asking for an adjustment of their claim against appellant Hege & Co., for compensation on account of the death of said decedent resulting from injuries received by him while in its employ. Said application was heard by a single member of the industrial board, resulting in an award in favor of appellees, based on a finding of facts which recited that appellant Fidelity & Casualty Company was the compensation insurance carrier of said Hege & Co. on the date the decedent received his said injuries. This award was afterward reviewed by the full board on the application of appellants, which resulted in an award in favor of appellees, and from which award appellants are prosecuting this appeal.

[1-3] Appellants have assigned as errors on which they rely for reversal that the award of the full board is not sustained by sufficient evidence and is contrary to law. Under these assigned errors appellants assert that there is no competent evidence in the record proving, or tending to prove, directly or by legitimate inference, that the injury causing the death of said Howard Tompkins was sustained by an accident arising out of, and in the course of, his employment by appellant Hege & Co. This is the sole question presented for our consideration. We agree with appellants' contention that the burden rested on appellees to furnish evidence establishing facts from which the conclusion could be properly drawn that the decedent's injuries were caused by an accident arising out of, and in the course of, his employment by Hege & Co. Haskell & Barker Car Co. v. Brown (1917) 117 N. E. 555. Also that the ultimate facts upon which an award is based must be supported by some competent evidence. United Paperboard Co. v. Lewis (1917) 117 N. E. 276. However, it should be borne in mind that a finding of facts by the industrial board stands upon the same footing as the finding of the trial court or the verdict of a jury, and when sustained by any competent evidence is conclusively binding on this court. Bloomington Bedford Stone Co. v. Phillips (1917) 116 N. E. 850; Sugar Valley Coal Co. v. Drake (1917) 117 N. E. 937. Such board, like a court or jury, may draw reasonable inferences from the facts and circumstances in evidence. Haskell & Barker Car Co. v. Brown, supra.

With these well-settled rules in mind, we proceed to determine the question before us. The evidence in this case discloses that the deceased died as a result of an injury to one of his thumbs. W. F. Kendall, a

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member of the firm of Hege & Co., testified that the deceased was in the employ of said firm as a carpenter at the time of his injury, and that the deceased told him that he had run a splinter or sliver in his thumb while he was at work finishing a room at the residence of James Pierce. Adra M. Tompkins, widow of the deceased, testified that her husband came home on the evening of the day he was injured and told her that he had hurt his thumb, and that he thought he had struck it on a screw. A. A. Kirkpatrick, a physician who attended the deceased after his injury, testified that the deceased stated to him that he had hurt his thumb with a sliver off a screw while at work. The witness said that from the nature of the injury he thought that was correct. Paul C. Graham, another physician who treated the deceased after his injury, testified that the deceased told him that he had pricked the end of his thumb with the burr on a screw. Both physicians gave it as their opinions that the deceased died as a result of the injury to his thumb. The evidence shows that the deceased was injured on April 8, 1918, and that he died as a result thereof on April 18, 1918. On April 17, 1918, his employer, Hege & Co., made a report of the accident in question to the industrial board. This report is in evidence, and states, among other things, that on April 8, 1918, the deceased was injured while in its employ by an accident arising out of, and in the course of, the employment; that the injury was caused by a sliver off a screw being run into the end of one of his thumbs, resulting in infection of his left hand and forearm. This is substantially all the evidence bearing on the question under consideration.

[4-7] Appellants contend that the statemets made by the deceased to the several witnesses as to the cause and manner of his injury are hearsay, and therefore incompetent as evidence. Appellees admit that such statements are hearsay, but assert that, under the state of the record, the industrial board had the right to consider the same regardless of such fact. It is firmly settled in this state that a material fact at issue may be established by hearsay evidence, where the same is admitted without objection. Metropolitan Life Ins. Co. v. Lyons (1912) 50 Ind. App. 534, 98 N. E. 824. In that case the court said:

"The party against whom such evidence is introduced may not take his chance of obtaining a favorable verdict at the hands of the jury on the evidence so admitted, and then, after an adverse verdict, obtain a new trial on the ground that the verdict does not rest on any competent evidence."

The above case has been cited with approval in Wagner v. Meyer (1913) 53 Ind. App. 223, 101 N. E. 397; Buttz v. Warren Mach. Co. (1913) 55 Ind. App. 347, 103 N. E. 812; Baxter v. Moore (1914) 56 Ind. App. 472, 105 N. E. 588.

The reasons for adopting the above rule in ordinary civil actions apply with even greater force in hearings before the industrial board. It is evidently the intent of the Workmen's Compensation Act that, by concise and plain summary proceedings, controversies arising under the same should be promtly adjusted by a simplified procedure, unhampered by the more technical forms and intervening steps which sometimes incumber and delay ordinary civil actions. Acts 1915, p. 408, § 55. In harmony with the manifest intention of the act, this court has held that the industrial board is not bound by the rules of court procedure in civil actions (Hagenback v. Leppert [1917] 117 N. E. 531); that a motion for a new trial is not an essential to the right of appeal on any question (Union Sanitary Mfg. Co. v. Davis, 63 Ind. App. 548, 114 N. E. 872); that the admission of incompetent evidence by the industrial board will not operate to reverse an award, if there be any basis in the competent evidence to support it (United Paperboard Co. v. Lewis, supra). To deny the application of the rule relating to hearsay evidence, as stated and applied in the case of Metropolitan Life Ins. Co. v. Lyons, supra, in proceedings before the industrial board, would be to violate

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the spirit of the act by applying a more rigid rule with reference to hearsay evidence in such proceedings than is applied in civil actions. We see nothing unreasonable or harmful in applying the rule announced to proceedings before the industrial board, as it would only require that a party objects to hearsay evidence when offered, in order to overcome the presumption which would otherwise arise that he consented to its admission and consideration by the board. In this case the hearsay evidence was admitted without objection, and the board, therefore, had a right to consider the same, and give it such probative force as it might believe it merited, under all the attendant facts and circumstances.

[8-13] Appellants also contend that the report of the accident filed by Hege & Co. with the industrial board, and introduced in evidence, is not competent as an admission against appellants that the deceased was injured by an accident arising out of, and in the course of, his employment. It bases this contention on a number of reasons, which we will consider in the order given. It is claimed that the report is an ex parte statement and within the hearsay rule. It appears to have been introduced in evidence without objection, and, as it is a statement by the party primarily liable, it is competent as an admission, notwithstanding its ex parte character. It is also urged that the report was filed pursuant to section 67 of the Workmen's Compensation Act, which required that it be made on a blank prepared and furnished by the industrial board for that purpose, and therefore was not a voluntary statement of a material fact. The record does not disclose what portion of the report is the printed form and what portion was inserted therein by the party making the same. But, conceding that the statement in question is a part of the printed form, it appears in evidence over the signature of the decedent's employer without explanation, and it must be held to have adopted the same. While the law requires that such reports must be made on blanks to be procured from the industrial board for that purpose, it is not so unyielding or unreasonable as to require the adoption of any statement therein, or the making of an answer to any question, which is not in accord with the facts, or about which the party making the report cannot obtain reliable information. It is further urged that such statement is a conlusion of law and not a statement of a material fact. But admitting, without deciding, that such statement is a conclusion of law, still we know of no rule that requires an admission to be disregarded because made in the form of a conclusion of law rather than a statment of fact, and hence we conclude that this reason gives no support to appellant's contention. It is claimed that the uncontradicted evidence shows that the statements made in the accident report are based on hearsay evidence, and not upon facts within the knowledge of the deceased's employer or its agent. If this be conceded, it does not follow that the report must be disregarded. We know of no rule that precludes a party from making an admission based on hearsay evidence if he chooses so to do, and therefore we cannot adopt appellant's view in this regard.

It is finally urged that, by the provisions of section 56 of the Workmen's Compensation Act, accident reports received from employers in accordance with section 67 thereof are private records of the industrial board, open only for the inspection of the parties directly involved, and that their use as evidence against an employer is prohibited. An inspection of said section 56 will disclose that it does not make an absolute prohibition against the use of such report as evidence, the exact provision in that regard being as follows: "These reports shall not be used as evidence against an employer in any suit at law brought by an employee for the recovery of damages." This provision cannot be construted as a prohibition against the use of such reports in proceeding before the industrial board by injured employees or their dependents to secure the compensation due them under the provisions of said act. We therefore conclude that appellant's contention with reference to the competency of the accident re-

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port in question as evidence cannot be sustained. Our conclusion in this regard finds support in the case of Rock v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771. The act of the state of Michigan under which this case was decided provides, as does section 67 of the Workmen's Compensation Act of this state, that every employer shall keep a record of all injuries "received by his employees in the course of their employment." A question arose in the case just cited, as it did in the instant case, with reference to the admission of the accident report of the employer in evidence, and the court in passing on such question said:

"We think that such reports from the employer, where all sources of information are at hand when the reports are made, and he has ample opportunity to satisfy himself of the facts, can properly be taken as an admission, and, at least, prima facie evidence that such accident and injury occurred as reported."

No evidence was offered to impeach the report so made, or to show that the accident occurred otherwise than stated therein. Considering the evidence as a whole, with all reasonable inference deducible from the facts established thereby, we are forced to the conclusion that the finding of facts is supported by the evidence, and the award fully justified by the facts found.

The award is therefore affirmed, and by virtue of the act of March 5, 1917 (Acts 1917, p. 155), the amount thereof is increased 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

NATIONAL CAR COUPLER CO.

v.

MARR ET AL. (No. 10367.)*

1. MASTER AND SERVANT—COMPENSATION FOR INJURIES—EMPLOYMENT.

Where a deceased workman was tapping in a bolt in a sand machine when he fell into the machine and was killed, *held* that, though he violated instructions, the accident cannot be deemed one which did not arise out of the employment, so as to preclude an award of compensation by the Industrial Commission; the violation of instructions going to the question of willful misconduct.

(For other cases, see Master and Servant, Dec. Dig. § 380).

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEFENSES—ABANDONMENT.

Where an employer against whom the dependents of a deceased employee sought an award abandoned the second paragraph of its answer setting up willful misconduct, that defense was waived.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Appeal from Industrial Board.

Application by Viola E. Marr and others, as dependents of Thomas Marr, deceased, for an award against the National Car Coupler Company

* Decision rendered, Jan. 23, 1919 121 N. E. Rep. 545.

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for injuries resulting in death arising out of employement. From an award of compensation, by the Industrial Board, defendant appeals. Affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellant.
J. W. Whicker, of Attica, for appellees.

DAUSMAN, C. J. Appellees, as dependents of one Thomas Marr, deceased, filed their application for an award against appellant. Appellant answered in two paragraphs: (1) General denial; and (2) averring willful misconduct. The Industrial Board awarded compensation. The nature of the case is fully disclosed by the following statement of facts included in the finding made by the board:

"On the 2d day of January, 1918, one Thomas Marr was in the employment of the defendant company as a sand mixer at an average weekly wage of $17.37. On said date the said Thomas Marr was making an adjustment upon the sand mixer machine, which it was his duty to assist in operating. While making said adjustment, the said Thomas Marr accidentally fell into said machine, which was in motion at the time. By falling in said machine, the said Thomas Marr was instantly crushed to death."

Appellant abandoned its second paragraph of answer, and the only contention presented is that the workman's death did not arise out of the employment. This contention is based on the theory that the superintendent of the plant had given the workman certain instructions which were violated by the latter, that the effect of the instructions was to limit the scope of the employment, and that the violation of the instructions by the workman put him entirely outside the employment.

The superintendent testified:

"I gave him the instructions to be careful around machinery; not to make any alterations until he stopped the machine. I cautioned him several times about being careful around machinery. * * * He had been working on sand mixers prior to the time he began working on this one. * * * I have told him many a time that, if he had anything to fix to report it to the mechanics. * * * Some men have tapped in bolts—that depends somewhat on where the bolt is. * * * It would depend on the man whether it would be a dangerous operation for a man to stand where Mr. Marr is said to have been standing, stooping over, facing the revolving pan. I could do it, I think, and not get hurt. He (Marr) looked after the machine and every man on the machine; and, if there were any lost bolts that he or any other man noticed, it would be his duty to have it fixed."

[1, 2] The uncontroverted evidence discloses that the workman was "tapping in" a bolt when he fell into the machine; but it would be illogical to hold that his death did not arise out of the employment, even if it should be conceded that he violated the instructions. The insistence that he violated instructions has no bearing on that point. It goes rather to the question of willful misconduct. But we may not even intimate an opinion as to what it would be worth in that direction, for appellant has waived it by expressly abandoning its second paragraph of answer.

The award is affirmed, and by virtue of the statute (Laws 1915, c. 106) the amount thereof is increased 5 per cent.

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SUPREME COURT OF IOWA.

DES MOINES UNION RY. CO.

v.

FUNK, INDUSTRIAL COM'R, ET AL. (No. 31300.)*

1. COMMERCE—WORKMEN'S COMPENSATION ACT—INTERSTATE COMMERCE.

All controversies touching liability of railroad company engaged in interstate commerce to its employees likewise engaged are removed by federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) from sphere of state legislation, and commission provided for in Workmen's Compensation Act has no jurisdiction of case of injury while engaged in interstate commerce.

(For other cases, see Commerce, Dec. Dig. § 8[6].)

2. MASTER AND SERVANT—TESTING POWER OF BOARD UNDER COMPENSATION ACT—INADEQUATE REMEDY BY APPEAL.

Under Code 1897, § 4154, railroad company against which board of arbitration appointed under Workmen's Compensation Act had made award in favor of widow of deceased servant, killed in interstate commerce, *held* entitled to certiorari to test right of board to act; remedy by appeal after confirmation of award by district court not being plain, speedy, or adequate.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

Appeal from District Court, Polk County; Lawrence De Graff, Judge.

Certiorari to test the right of a commission appointed under the Workmen's Compensation Act to hear and determine the liability of a railroad company to its employee when the injury arose at a time when both were engaged in interstate commerce. Opinion on rehearing, superseding former opinion (164 N. W. 648). Reversed.

Parrish & Cohen, of Des Moines, for appellant.

Miller & Wallingford and Oliver H. Miller, all of Des Moines, for appellees.

GAYNOR, J. Martin Walker was employed by the plaintiff company as a wheel borer in one of its shops at Des Moines, where, on the 25th day of August, 1915, he was accidentally caught upon a revolving shaft of certain machinery, receiving injuries from which he died. Prior to this accident both employer and employee had elected to accept the terms of the Workmen's Compensation Act (chapter 147 of the Laws of the Thirty-Fifth General Assembly). Myrtle M. Walker, widow of the deceased, applied to the Industrial Commission, alleging that her husband came to his death by accident while in the course of his employment, and asking that her damage or compensation be assessed as provided by said act. A board of arbitration was organized and proceeded to hear the case. The plaintiff herein, as the employer of the deceased, appeared, and denied liability on the alleged grounds: First, that the deceased was not in the course of his employment at the time of his death; and, second, that his said employer, plaintiff herein, was at that time engaged in business as a

* Decision rendered, Jan. 27, 1919. 170 N. W. Rep. 529.

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common carrier of interstate commerce, and the employee (for whose death compensation was asked) was at the time of his death in the service of the company in and about such business.

The board of arbitration found that the deceased was in the course of his employment at the time of the accident, and that he was engaged in the work of interstate commerce. It also found that the widow's claim was just and recoverable, under the Compensation Act, and assessed the amount of her recovery. Thereafter the company (plaintiff herein) began this action in certiorari in the district court of Polk county, alleging that the Industrial Commissioner and the board of arbitration had exceeded their jurisdiction in that said company and the deceased were engaged in interstate commerce at the time of the accident, and that the whole remedy of the widow, if any she had, was under the statutes of the United States, or what is known as the Employers' Liability Act. Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. §§ 8657-8665.)

Upon these allegations a writ of certiorari was issued to the Industrial Commissioner and the widow of the deceased requiring a return to be made to the district court of the record of the proceedings had before said commissioner and the board of arbitration. Full return was made and certified to the district court in obedience to the writ, and upon the showing thus made the defendants moved to quash the writ and dismiss the certiorari proceedings because the defendant company had a plain, speedy, and adequate remedy at law by appeal. This motion was sustained, the proceedings dismissed, and the plaintiff appeals.

A determination of the controversy here requires the consideration of the following propositions:

First. Does the Workmen's Compensation Act provide for any appeal from the assessment of damages under the terms of the said act?

Second. If there be a right of appeal, is it exclusive, or may the jurisdiction of the commission and the board of arbitration in any given case be questioned and determined in a certiorari proceeding?

Third. Does the fact, if it be a fact, that the deceased was killed while employed in interstate commerce, bar his widow from the right to demand and receive the benefit of the Workmen's Compensation Act?

[1] We will consider the last proposition first: Is one entitled to invoke the said Workmen's Compensation Act when it is shown that both the employer and the employee were at the time of the injury engaged in interstate commerce?

For the purposes of this decision we assume that they were so engaged. The commission so found. There never has been any doubt among the courts that, when Congress acts upon a subject, all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. But there has been some controversy as to whether the federal Employers' Liability Act does cover injuries occurring without negligence. It has been the contention of some able counsel and is the holding of some of the state courts that the federal Employers' Liability Act covers or regulates the liability or obligation of carriers, and the right of the employee only for injury resulting in whole or in part from negligence, and does not cover injuries occurring without negligence. Following this line of reasoning, some of the courts have held that the state Workmen's Compensation Act could be invoked and relied upon, and relief given, in cases where the liability is not predicated on negligence, and the thought in the reasoning is that the federal Employers' Liability Act covers liability arising from the negligence of the carrier only. The Supreme Court of New Jersey, in Winfield v. Erie Ry. Co., 88 N. J. Law, 619, 96 Atl. 394, held that, where the federal act affords no remedy, that is, where the injury occurs under such circumstances that no liability is imposed upon the carrier by the act, the injured employee may invoke the remedy by the state statute, so it was said that, in order to defeat the right to invoke the state Workmen's Compensation

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Act, it must affirmatively appear that right of action is given to the widow or personal representatives of the employee by the federal statute; in other words, that it must appear that the injury resulted in whole or in part from negligence chargeable to the defendant company, in order to bring it within the federal Employers' Liability Act. On this basis of reasoning that court held that the liability sought to be enforced was not a liability arising out of negligence, and therefore not covered by the federal Employers' Liability Act, but rested on a contractual obligation created by the state statute, consented to by both the employer and the employee, and said, in substance, that the injured party is entitled to invoke the state statute in the absence of any averment by her, or any proof offered, or any admission made by the defendant company, showing that the death of her decedent resulted from the defendant's negligence; that negligence is essential to create a liability against it under the federal statute.

The New York court held to substantially the same doctrine in Winfield v. New York Central Ry. Co., 216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916A, 817. The California and Illinois Supreme Courts, however, held to a different doctrine. Smith v. Industrial Accident Commission, 26 Cal. App. 560, 147 Pac. 600; Stanley v. Illinois Central Ry. Co., 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450. In the last case it was said:

"The federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the federal government. Necessarily all common or statute laws of this state on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the federal Employers' Liability Act, and that, too, regardless of the negligence or lack of negligence of either party to the litigation."

Whatever controversy may have existed has not been set at rest by the decision of the Supreme Court of the United States, and the doctrine announced by the courts of California and Illinois has been approved. Winfield v. New York Central, heretofore cited, came to the Supreme Court of the United States, and is reported in 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918 C, 439, Ann. Cas. 1917D, 1139, and it was held that the doctrine announced by the Supreme Court of New York and New Jersey was wrong. It was said:

"True, the federal Employers' Liability Act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it. * * * * It was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence."

In Erie Ry. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, these questions were presented:

First. Whether the federal Employers' Liability Act is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, or only in those instances where there is casual negligence for which the carrier is responsible.

Second. Whether by reason of the said statute (state Workmen's Compensation Act) the carrier became bound contractually to make compensation, even though it came within the federal act.

The disposition of the first question was made by referring to what was said in New York Central Ry. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139, saying further:

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"We are of opnion that the federal act proceeds upon the principle which regards negligence as the basis of the duty to make compensation and excludes the existence of such a duty in the absence of negligence, and that Congress intended the act to be as comprehensive of those instances in which it excludes liability as of those in which liability is imposed. It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive."

Answering the other question, the court said that the Workmen's Compensation Act differed materially from the federal act. The Workmen's Compensation Act rejects negligence as a basis of liability, and requires compensation to be made by the employer wherever the injury or death of the employee is an incident of the service in which he is employed. This part is described as "elective," and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby, and to surrender their rights "to any other method, form, or amount of compensation or determination thereof.". Respecting the mode of manifesting such an agreement or the contrary, it is provided that every contract of hiring "shall be presumed to have been made" with reference to this part of the statute, and unless the contract or a notice from one party to the other contain "an express statement in writing" to the contrary, it "shall be presumed that the parties have agreed to be bound" by this part of the statute. The court then said:

"But such a presumption cannot be indulged here, and this for the reason that by the federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of the state laws. It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of the state statute, or by imputing such an election to them by means of a statutory presumption. This question must therefore be answered in the negative."

We deduce from these holdings that all controversies touching the liability of a railroad company engaged in interstate commerce to its employees engaged in the same way are removed by the federal Employers' Liability Act from the sphere of state legislation, and that the commission provided for in the statute for ascertaining and determining liability between employer and employee has no jurisdiction when the injury occurred while both parties were engaged in interstate commerce.

[2] This brings us to a consideration of the first and second propositions hereinbefore stated.

It appears that, when the matter came before the commission, the plaintiff raised the ground of jurisdiction, and claimed that both parties were engaged in interstate commerce, and that the rights of the parties were regulated and controlled by the federal Employers' Liability Act. The commission, however, proceeded to determine the question of liability, and did determine that the plaintiff in this suit was liable for injury under the provisions of the Workmen's Compensation Act. Thereupon this plaintiff sued out a writ of certiorari alleging and claiming that the tribunal was without jurisdiction to hear the matter. The defendant in this suit came into court and moved to dismiss the writ for the reason that the plaintiff had a plain, speedy, and adequate remedy at law. This was sustained.

Under the statute no appeal lies from the action of the commission. The commission acts and determines the rights of the parties, and its finding is filed in the district court, and a judgment is there entered in accordance with the finding. That is the first time that the right of appeal attaches. The direct claim of plaintiff is that the inferior tribunal, from whose action no appeal lies, had exceeded its jurisdiction, and was acting illegally in the premises. Our statute (section 4154, Code 1897) provides:

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"The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board or officer excercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy."

It is the general holding of the courts that, where the objection made is one of jurisdiction, of a juridistional nature, and it is shown satisfactorily that the proceeding sought to be reviewed is wholly unauthorized, the mere right of appeal is not speedy or adequate within the meaning of the statute, and certiorari will therefore lie. Davis v. Preston, 129 Iowa, 670, 106 N. W. 151; Young v. Preston, 131 Iowa, 293, 108 N. W. 463; Ryan v. Hutchinson, 161 Iowa, 575, 143 N. W. 433; Barry v. Court, 167 Iowa, 306, 149 N. W. 449; Timonds v. Hunter, 169 Iowa, 598, 151 N. W. 961; Voting Machine Co. v. Hobson, 132 Iowa, 38, 109 N. W. 458, 7 L. R. A. (N. S.) 512, 119 Am. St. Rep. 539, 10 Ann. Cas. 972.

It is true that the mere allegation that a tribunal is acting without jurisdiction is not, in and of itself, sufficient to justify the issuing of a writ in all cases. But when some substantial fact is shown which, if true, proves that the proceeding complained of is unauthorized, and that the tribunal is without power of authority to entertain it, then certiorari lies. In the instant case the jurisdiction was challanged on the ground, which is not disputed, that both parties were engaged in interstate commerce at the time of the injury. If this be true, then, under the holding of the Supreme Court of the United States, the commission constituted by the Workmen's Compensation Act had no jurisdiction of the subject-matter of this controversy. Further than that, it is not sufficient that there appear to be a right of appeal. The remedy afforded by appeal must be plain, speedy and adequate. Is remedy by appeal speedy when, by the act itself, the right of apepal is postponed until after a judgment has been entered against the party complaining? The commission was without jurisdiction. It had no right to hear and determine any fact upon which the court, under the statute, might enter judgment. Can it be said that the remedy by appeal is speedy when no direct appeal is allowed from the action of the body whose right to act is questioned, and when the right to review is postponed until after the judgment has been entered upon its illegal and unauthorized findings. Jurisdiction involves the right to hear and determine. The writ of certiorari is allowed to the end that its right to hear and determine may be investigated. Certiorari is the remedy under our statute. Defendant questioned the commission's right to take evidence, to hear and determine the liability of this plaintiff, and show that the subject-matter under investigation is not within the jurisdiction of the tribunal attacked. No discussion can make plainer the fact that the commission had no jurisdiction to inquire into, or determine, any fact touching the liability of this plaintiff to the injured party, when both were engaged in interstate commerce. The commission assumed jurisdiction. It assumed the right to make a report to the district court, upon which, under the law, without notice to this plaintiff, judgment would be entered against the plaintiff. The proceeding here called in question the very right to do this thing; questioned the right of the tribunal to do it. It was the only speedy remedy open to the complaint here. He was not required to sit by and permit a tribunal, acting upon a subject-matter over which it had no jurisdiction, to determine the existence of a liability which, under that statute, must merge into a judgment, and then appeal from that judgment.

The remedy by appeal was neither plain, speedy, nor adequate. The right to a writ of certiorari existed. The court erred in quashing the writ. The cause is therefore reversed.

Reversed.

Ladd, C. J., and Preston and Stevens, JJ., concur.

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SUPREME COURT OF IOWA.

RISH

v.

IOWA PORTLAND CEMENT CO. (No. 32426.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —APPEAL—PROCEDURE.

Acts 37th Gen., Assem. c. 270, § 17, as to appeals from order of industrial commissioner under Workmen's Compensation Act taken after July 1, 1917, applies to injuries received before as well as those received after July 1, 1917, when the statute became effective, section 17 having repealed Code Supp. 1913, § 2477m33, applicable prior to such date, and section 21, making act inapplicable to injuries received prior to such date relating to right to compensation, amount thereof, etc., and not to procedure.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —BURDEN OF PROOF.

Plaintiff seeking compensation under Workmen's Compensation Act has burden of showing that injuries arose "out of and in the course of the employment" within the act.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"COURSE OF EMPLOYMENT."

Employee, who was in the shop in which he worked all ready for the day's work at the time of the accident, was injured in the "course of his employment," within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

Provisions of Workmen's Compensation Act which benefit both the master and servant should be liberally construed without regard to technical rules.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"OUT OF THE EMPLOYMENT."

Where electrician was injured from explosion of dynamite cap while striking match to light cigarette while in the shop approaching his work bench to start the day's work, the injuries arose "out of the employment," within Workmen's Compensation Act, though use of caps was confined to different building, and their presence in electric repair shop was prohibited by employer's rules.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

Appeal from District Court, Polk County; Thos. J. Guthrie, Judge.

The nature of the action and the material facts are fully stated in the opinion. Reversed.

* Decision rendered, Jan. 23, 1919. 170 N. W. Rep. 532.

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S. B. Allen, of Des Moines, for appellant.
Don. G. Allen and M. H. Cohen, both of Des Moines, for appellee.

STEVENS, J. [1] This case comes to us on appeal from the judgment of the court below, sustaining the order of the industrial commissioner denying plaintiff compensation, under the Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), for injuries received to his left hand while in the employ of defendant. A motion filed by counsel for appellee to dismiss the appeal upon the ground that the court is without jurisdiction thereof was ordered submitted with the case, and counsel have furnished us with briefs and argument thereon. The ground of the motion is that the injury complained of occurred prior to July 1, 1917, and that plaintiff, in taking said appeal, should have followed the provisions of section 2477m33 of the 1913 Supplement. This section was repealed by section 17, c. 270, Acts of the Thirty-Seventh General Assembly. Many other provisions of the Workmen's Compensation Act were repealed or amended thereby. Chapter 270 was approved April 21, 1917, and, so far as applicable to the case at bar, became effective July 1, 1917. It was there provided (section 21) as follows:

"Nothing in this act shall be held to in any manner affect litigation now pending, or to apply to any case in which the injury occurred prior to July 1, 1917."

The appeal was taken within the time and in the manner required by section 17, c. 270, but not within the time required by section 2477m33, supra. Section 21, supra, evidently relates to the right of the employee to compensation, amount thereof, etc., and not to procedure. No appeal was possible until after section 2477m33 had been repealed and section 17 of chapter 270, enacted in lieu thereof, had gone into effect. The procedure prescribed by the latter could alone, therefore, be followed. It was the obvious intention of the Legislature to preserve the rights and liabilities of the parties as they existed at the time of the accident, but there is nothing in the language of section, 21 to indicate that the procedure prescribed by section 17 is not to be followed in cases where the accident occurred prior to July 1, 1917. Richardson v. Fitzgerald, 132 Iowa, 253, 109 N. W. 866; McLane v. Bonn, 70 Iowa, 752, 30 N. W. 478; Drake v. Jordan, 73 Iowa, 707, 36 N. W. 653; Farley v. O'Malley. 77 Iowa, 531, 42 N. W. 435.

The motion to dismiss the appeal should be, and is, overruled.

II. The commissioner found the facts to be as follows:

"At the time of his injury, Robert A. Rish was performing service as an electrician for the Hawkeye Portland Cement Company. Just prior to the accident resulting in this injury, he had come upon the premises of his employer, prepared himself for the duties of the day, and approached his work bench in the electrical repair shop. He had just rolled a cigarette, which he placed in his mouth, and then struck a match for the purpose of lighting the same. He testified he does not know whether he applied the match to the cigarette or not, but that from the result of an explosion he found himself prostrate upon the floor. A cigarette which had been lighted and partially burned was found upon the floor, as was also the match in question.

"Rish was found to have lost portions of the thumb and two fingers on his left hand. Near the waist line, toward his left side, he was found to have been severely burned. Careful scrutiny disclosed the presence of pieces of copper, upon which fact is based the plausible theory commonly accepted that these injuries had occurred from the explosion of a dynamite cap. An hour or so later, the locker in which the overalls worn by Rish at the time of the accident had been placed was broken open by an employee of the company upon the order of one in authority. By the testimony of three witnesses, it appears that a dynamite cap was

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discovered in the watch pocket of this garment, the same pocket from which Rish testified he secured the match with which to light his cigarette. * * *

"Counsel utterly failed in this undertaking to prove that the defendant company injected into the service of this workman unusual peril by the common presence of dynamite caps about his place of service. The electrical repair shop was detached from any building in which dynamite caps had any right to be. It was not shown that any such explosive had ever been seen upon the work bench in question. The evidence justifies the conclusion that rules against the presence of dynamite caps in the electrical repair shop were very strict and that a workman imperiled his engagement by his display of such explosives in this building."

[2] To entitle plaintiff to compensation, under the provisions of the Workmen's Compensation Act, the injuries sustained must have arisen "out of and in the course of the employment," the burden of showing which rests upon him. Griffin v. Code Bros., 165 N. W. 577; De Mann v. Hydraulic Eng. Co., 192 Mich. 594, 159 N. W. 380.

[3] It is conceded that plaintiff, at the time of the accident, which occurred between 6 and 7 o'clock a. m., was on the premises of the defendant for the purpose of engaging in the day's work, and therefore the finding of the commissioner that he was at the time of the accident in the course of his employment must be sustained. Griffin v. Cole Bros., supra; Pace v. Appanoose County, 168 N. W. 916. Did the injury, however, arise "out of" the employment? An injury, within the meaning of the Workmen's Compensation Act, is said by the court, in Griffith v. Cole Bros., supra, to arise out of the employment, when it appears "'by a preponderance of the evidence that there is some causative connection between the injury and something peculiar to the employment (Jones v. Association, 92 Iowa, 652, 61 N. W. 485), that it resulted from some risk reasonably incident to the employment, because "out of" involves the idea that the injury is in some sense due to the employment (Fitzgerald v. Clark, 2 K. B. 796), a causative danger peculiar to the work, and not common to the neighborhood,' an injury fairly traceable to the employment as a contributing cause, to some hazard other than one to which the workman would have been equally exposed, though in a different employment (In re McNicol, 215 Mass. 487, 102 N. E. 697, L. R. A. 1916A, 306), a hazard peculiar to the business which is 'the immediate cause' of the injury (Roger v. School Board, 1 Scots Law Times, 271 * * *), an injury due to something more than the normal risk to which all are subject, which at the least means that the employment necessarily accentuates the natural hazard attendant upon work done in the course of the employment (State v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344)." See, also, Pace v. Appanoose Co., supra; In re McNicol, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

Applying the above interpretation of the language of the act to the facts of the case at bar, did the injuries arise "out of the employment"? As will be observed from a careful reading of the cases cited, the tendency of the courts in all jurisdictions, where similar acts are in force, is to give a broad and liberal construction to the provisions thereof. Injuries received while the workman was engaged in ministering to himself, such as warming himself, seeking shelter, quenching his thirst, taking refreshment, food, fresh air, or resting in the shade, have been held compensable. Honnold on Workmen's Compensation, § 111; Northwestern Iron Co. v. Industrial Com'n, 160 Wis. 633, 152 N. W. 416; Goodlet v. Caledonian Ry. Co., 4 F. 896; Moore v. Lehigh Valley R. Co., 169 App. Div. 177, 154 N. Y. Supp. 620; Zabriskie v. Erie R. Co., 86 N. J. Law 266, 92 Atl. 385, L. R. A. 1916A, 315; Phil Hollenbach v. Hollenbach, 181 Ky. 262, 204 S. W. 152; In re O'Toole, 229 Mass. 165, 118 N. E. 303; Merlino v. Connecticut Quarries Co., 93 Conn. 57, 104 Atl. 396; Robinson v. State, 93 Conn. 49, 104 Atl. 491; Baltimore Car Fdy. Co. v. Ruzicka, 132 Md. 491, 104 Atl. 167; Newport Hydrocarbon Co. v. Ind. Com., 167 Wis. 630,

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167 N. W. 749; Pekin Cooperage Co. v. Inc. Com'n, 285 Ill. 31, 120 N. E. 530. The following cases are, however, more nearly analogous in their facts to the case at bar:

In Dzikowska v. Superior Steel Co., 259 Pa. 578, 103 Atl. 351, the plaintiff was, just prior to the accident, engaged, with other workmen, in loading steel upon a railroad car, and, while waiting for the arrival of trucks with more steel his clothing caught fire, and he was so badly burned that death ensued a few days later. He was wearing a burlap apron, and also had a quantity of the same material wrapped around his arms for the purpose of protecting himself in handling steel, much of which was oiled, causing his clothing to become more or less saturated with oil. Stepping out of the shipping room, he went into a box car to smoke, and, while there, the apron caught fire from a match which he lighted by striking the same upon his trousers. The court, in the course of its opinion, referring to the act of smoking, said:

"Nor do we regard the fact that the accident resulted from his striking a match for the purpose of enabling him to smoke at that time and place as being sufficient to debar him and his dependents from the benefits of the statute. It is not unreasonable for workmen to smoke out of doors during intervals of work, where it does not interfere with their duties. And in this instance the foreman testified that he did not interfere with the men when they were smoking out of the building, but he did not allow smoking inside."

A workman, while at work on one of his employer's jobs, ran a nail into the palm of his hand, whereupon an employee wrapped a bandage around it, which the workman saturated with turpentine. While in the act of lighting a cigarette with a match, the bandage caught fire, severely burning his hand. The Supreme Court of California sustained the finding of the commissioner awarding compensation. Whiting-Mead Com. Co. v. Ind. A. C. (Cal.) 173 Pac. 1105.

In Haller v. City of Lansing, 195 Mich. 753, 162 N. W. 335, L. R. A. 1917E, 324, plaintiff, a workman engaged in grading and leveling a place for a stone crusher, went to a small toolhouse near by, in which the tools of workmen were kept, for shelter while eating his dinner, and was fatally injured by an explosion of gasoline contained in an old can in the building caused by a match with which he had lit his pipe. His right to compensation was sustained.

Likewise, it was held in McLachlan v. Anderson, 49 S. C. L. R. 349, that a workman employed as a laborer in connection with loading and unloading wagons and accompanying them while being hauled by a traction engine from one quarry to another, who was injured while attempting to get down to recover his pipe, which he had dropped, was entitled to compensation. Under the statutes of Pennsylvania, compensation is allowed for injuries "arising in the course of the employment." The words "arising out of" are not found therein. It will be observed that the commissioner in the case at bar found that the injuries arose in the course of plaintiff's employment, but the case nevertheless has some application to this case. The statutes of California and Michigan are similar to our own.

Emphasis is given in the final order of the commissioner to the fact that the explosion resulted from plaintiff's lighting a cigarette with a match. No one was able to otherwise account for the explosion. The commissioner found that dynamite caps were used by defendant upon other parts of its premises, but that, under its rules, they were neither used, nor permitted, in the building where plaintiff was employed and in which the explosion occurred. At the time of the explosion, plaintiff was standing near a work table on which he testified he had placed his tools preparatory to commencing work. No one saw a dynamite cap upon the table, or its vicinity, and plaintiff was unable to account for the explosion.

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A dynamite cap, similar to those used by defendant, was found in a pocket of plaintiff's overalls some hours after the accident; but he testified that he had not consciously taken it into the building.

The finding of the commissioner does not indicate that defendant's employees were prohibited from smoking upon the premises, or in the building in which plaintiff was employed, or that he was at the time of the accident engaged in violating any of the rules of his employment.

The theory upon which compensation has been allowed in cases where the injury occurred while the workman was engaged in protecting himself from cold, or refreshing himself with food, or other necessary comforts, is that some indirect benefit, at least, accrues therefrom to the master.

[4, 5] Smoking, while not a necessity, is a recognized and quite universal habit among workmen, and an indulgence reasonably to be anticipated by employers. The lighting of a cigarette with a match is not in itself attended by the slightest hazard It was rendered dangerous to plaintiff only by the presence of a powerful explosive in common use upon certain parts of defendant's premises. It may be that the officers of defendant were not negligent or to blame for the presence of the explosive in the building, but the right of the employee to compensation does not arise out of tort, but exists by reason of the provisions of the Workmen's Compensation Act, which defendant had not rejected. The purpose sought to be accomplished by the enactment of laws of this character can be promoted only by a liberal construction of the provisions thereof which benefit both the master and servant, and technical rules should be disregarded in their interpretation. The causal connection between the employment and the injury complained of is shown by the use of dynamite caps upon the premises, and the presence thereof in the room where plaintiff was regularly employed and required, by the terms of his employment, to work. In holding that plaintiff's injuries did not arise out of his employment, we are of the opinion that the commissioner erred.

III. The commissioner and one member of the arbitration committee found:

"The accident which caused this injury was apparently due to the striking of a match and the lighting of a cigarette by claimant, pending which proceeding an explosion occurred, evidently of a dynamite cap, the presence of which cannot be definitely accounted for. Since the proximate cause of this injury was the striking of the match for the purpose of lighting a cigarette, a proceeding of no interest or advantage whatever to the employer, and having no necessary connection with his employment, it is decided that in this proceeding claimant was out of the orbit of his employment to such extent as to make it necessary for us to decide that he is not entitled to compensation for his said injuries under the compensation statute"—which is substantially the language of the commissioner affirming the conclusion and finding of the committee.

Section 17, c. 270, Acts of the Thirty-Seventh General Assembly is, in part, as follows:

"The findings of fact made by the industrial commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the court may confirm or set aside such order or decree of the industrial commissioner, if he finds:

"(1) That the industrial commissioner acted without or in excess of his powers; or

"(2) That the order or decree was procured by fraud; or

"(3) That the facts found by the industrial commissioner do not support the order or decree.

"(4) That there is not sufficient competent evidence in the record to warrant the industrial commissioner in making the order or decree complained of.

"No order or decree of the industrial commissioner shall be set aside by the court upon other than the grounds just stated."

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The obvious basis of the finding by the arbitration committee and the commissioner is the undisputed fact that the explosion was caused by plaintiff's lighting a cigarette with a match. But for the proximate cause of the injury, as found by the commissioner, it may be fairly assumed that if plaintiff had been injured by the explosion of a dynamite cap in the building where the accident occurred, without some possible fault or concurring act upon his part, a different conclusion would have been reached. The finding of the commissioner upon questions of fact is made conclusive and binding upon the court by the statute; but, if the facts found do not support the order, or if there is not sufficient competent evidence in the record to warrant the industrial commissioner in making same, such order may be set aside by the court.

It is apparent that plaintiff had no reason to anticipate the presence of dangerous explosives in the building where he was employed. It is true he did not, in the course of his employment, have anything to do with dynamite caps, nor was he ordinarily exposed to any hazard on account of the presence and use thereof by defendant upon the premises; but they were used by defendant. That the legitimate use thereof was confined to parts of the premises remote from the building in which the accident occurred does not necessarily relieve the master from the duty to make compensation under the act to a servant, injured by the explosion of a dynamite cap in a part of the premises which ordinarily, and under the rules of the master, is free from danger on account thereof. The commissioner did not find that plaintiff took the explosive into the building where the accident occurred, and culpability upon his part causing the injury is not shown by evidence of fellow workmen that some time later they found a dynamite cap in a pocket of his overalls, which they took from a locker in which plaintiff kept them.

It is therefore the opinion of the court that the order of the commissioner denying plaintiff the right to compensation is not supported by the facts found, nor is it warranted by sufficient competent evidence in the record. Under the facts found, the order should have been in favor of plaintiff. The finding and judgment of the court below is therefore reversed, and the cause recommitted to the industrial commissioner for such further hearing or proceedings, in harmony with this opinion, as may be proper and necessary under the provisions of the statute.

Reversed.

Ladd, C. J., and Gaynor and Preston, JJ., concur.

SUPREME COURT OF IOWA.

KEYS ET UX

v.

AMERICAN BRICK & TILE CO. (No. 32304.)*

1. MASTER AND SERVANT—REVIEW—SUFFICIENCY OF ABSTRACT.

On appeal from action of district court affirming finding of Industrial Commissioner, appellant is not entitled to any relief, where under abstract for appellee, which has not been met by certification, it appears

* Decision rendered, Jan. 14, 1919. 170 N. W. Rep. 295.

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that record was not lodged in district court in such manner under the statute as to give it power to proceed as prayed.

(For other cases, see Master and Servant, Dec. Dig. § 418[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —EXCEPTION TO JUDGMENT—NECESSITY.

Although application prayed that district court render "decree" in accordance with decision of Industrial Commissioner, pursuant to Code Supp. 1913, § 2477m33, decision was not a chancery decree, reviewable de novo, and no relief can be had on appeal, in the absence of exception.

(For other cases, see Master and Servant, Dec. Dig. § 418[3].)

Appeal from District Court, Cerro Gordo County; M F. Edwards, Judge.

The compensation statute Committee on Arbitration made the plaintiffs an award, on the ground that their son had met his death through injury in the course of employment by defendant. The Industrial Commissioner, sitting in review, modified this award. The parents claim that they duly removed this finding to the district court. At any rate, that court did review the finding of said commissioner, and, as we gather it, seems to have affirmed his finding. But the parents have perfected an appeal from that action of the district court. Affirmed.

Garfield E. Breese, of Mason City, for appellants.

Blythe, Markley, Rule & Smith, of Mason City, and Miller & Wallingford, of Des Moines, for appellee.

SALINGER, J. I. These plaintiffs obtained an award by the arbitration committee. The defendants caused this award to be reviewed by the Industrial Commissioner, and he modified the award in some particulars. The plaintiffs filed in the district court an application which asserted that the award of the committee and said decision of the Industrial Commissioner had been duly rendered, and thereupon asked the court to render a decree in accordance with said decision of the Industrial Commissioner "as provided by law, and particularly section 2477m33 of the Supplement to the Code, 1913" The court applied to entered a decision which as we understand it was substantially the finding of the Industrial Commissioner. The plaintiffs asked the court to render a decree in accordance with said finding. From the action of the court which they had requested, plaintiffs now appeal.

Ordinarily, no one would contend that he could maintain an appeal from any judgment he had asked a court to enter. It is not clear that this is so, but we take it to be the thought of appellants that the judgment of the court upon the finding of the commissioner was, while a necessary form, still merely a form, that appellants could not have the finding of the commissioner reviewed until the district court entered judgment thereon, that therefore they were bound to request such judgment, and that, as it is prerequisite to reviewing the finding of the commissioner in this court that the district court should enter judgment upon such finding, it cannot be that taking of the steps which alone made appeal possible can have the effect of destroying the appeal. But we cannot consider whether this position, if it be that of the appellant, be well taken, nor many other questions presented by the parties. We do not need to determine whether the situation at bar might not have been avoided by applying to the court, not to enter judgment upon the finding of the commissioner, but to give such judgment as the finding of the Industrial Commissioner should, as matter of law, have been.

]1, 2[There seem to be at least two insuperable obstacles to giving the appellants any relief: First, under the abstract of the appellee, which has not been met by certification, it would seem that the record was not

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lodged in the district court in such manner as under the statue to give that court the power to proceed as prayed; second, we are of opinion that, though the application prayed for decree, that the judgment of the court upon the application was not the entry of a chancery decree, reviewable here de novo as such. That being so, nothing in the statue differentiates this judgment from judgments as to which an exception is required, in order that appellant review may be had. Be the function of the district court what it may in entering judgment upon the finding of the commissioner or the award of the committee, it may not be complained of after it is entered by one who made no objection to it below after it was entered. It follows appellants may have no relief here if they took no exception below to the judgment, which formulated and made effective that of which they now complain. It appears by the abstract for appellee, which, as said, has not been met by certification, that neither party took any exception, and that no exception was entered. Appellee makes this point, and we find nothing in the argument for appellant that meets it.

In our opnion the action of the district court must be, and the same is, affirmed.

Ladd, C. J., and Evans, Preston, and Stevens, JJ., concur.

SUPREME COURT OF IOWA.

STORM

v.

THOMPSON. (No. 32339.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PERFORMANCE WITHIN STATUTE—"CONTRACTOR."

One employed to remove 62 trees preparatory to grading a street, to be paid in a lump sum, he furnishing his own tools, controlling his own time, and being responsible for nothing except the accomplishment of the removal of trees, was a "contractor," within Workmen's Compensation Act, § 16.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series Contractor.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—STATUTE—DEFENSES.

Workmen's Compensation Act, § 16, must be presumed to have used the word "contractor" in the sense it is commonly employed, and in which it has been defined by the courts.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Appeal from District Court, Polk County; Thos. J. Guthrie, Judge.

Proceedings under the Workmen's Compensation Act by G. W. Storm against George O. Thompson. From judgment affirming arbitrator's finding for defendant, plaintiff appeals. The opinion states the case. Affirmed.

* Decision rendered, Jan. 23, 1919. 170 N. W. Rep. 403.

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John D. Denison and Royal & Royal, all of Des Moines, for appellant.
Brockett, Straus & Shaw and Frank T. Jensen, all of Des Moines, for appellee.

WEAVER, J. The plaintiff for a period of two years or more had made a business of what he calls "tree work." Concerning it he says his occupation was "anything to be done with trees, such as trimming, removing, and chopping them down. That is the way I make my living." The defendant was a contractor engaged in grading a city street. The progress of this work appears to have required the removal of certain trees upon the land through which a way for the street was being cut. On March 17, 1917, the parties entered into a contract for the removal of the trees. The agreement was in writing and, omitting the signatures, reads as follows:

"This contract, entered into by G. W. Storm, party of the first part, and G. O. Thompson, party of the second part, witnesseth:

"The party of the first part agrees to remove by grubbing, if necessary, sixty-two (62) trees, located on Sixth avenue between Center and School streets, for the sum of seventy-five (75) dollars and the wood that said trees will make.

"Party of the second part agrees to remove stumps from job and furnish teams to haul wood to No. 1060, Sixth avenue."

Plaintiff proceeded with the work mentioned in the contract, and while so engaged, and in the act of removing one of the trees, he was accidentally injured in such manner, as to cause the loss of two fingers of his left hand. On the theory that he was an employee engaged in the service of the defendant he made claim for the allowance of damages under the Workmen's Compensation Act (Code Supp. 1913, §§ 2477m—2477m51). This demand was resisted by the defendant on the ground that plaintiff was not its employee but a contractor, and as such did not come within the protection of the statute. The majority of the arbitration committee to whom the matter was submitted found against the plaintiff on the theory that he was not an employee within the meaning of the compensation act but a contractor.

On the hearing before the court the contract was introduced in evidence, and the fact of plaintiff's injury shown. In addition thereto plaintiff testified that he did the work alone, using his own saws, axes, ropes, and other tools, but procured or borrowed from defendant a bar, pick, and shovel for temporary use on some parts of the job. As the defendant's steam shovel was also working in that vicinity and it was necessary to have the trees nearest the front of the shovel removed to avoid delaying its operation, it was understood between the parties that this work should have priority of attention, and on several occasions the defendant gave directions to that effect Plaintiff controlled his own hours and times of work so long as he kept it ahead of the shovel. After the accident defendant furnished a man to complete, or to asist plaintiff in completing, the removal of the trees.

There is no dispute as to the facts in the case. The trial court affirmed the arbitrators' finding, and plaintiff appeals

The Workmen's Compensation Act, after defining the word "workman" as synonymous with "employee," and meaning any person who has entered into the employment or works under contract of service for an employer, with certain special exceptions, attaches to such definition the following proviso:

"Provided that one who sustains the relation of contractor with any person, firm, association (or) corporation * * * shall not be considered an employee thereof." Code Supp. 2477m16.

The question we have to consider in this case is whether the plaintiff's relation to the defendant as shown by the evidence is that of a work-

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man or employee within the statutory definition of the term, and is therefore entitled to an award in damages; or is to be regarded as a contractor, and therefore not within the protection of the act

Whether the distinction thus drawn between workman and contractor is in all respects logical and just is a consideration for the Legislature and not for the court, which must apply and give effect to the statue according to its plain and unequivocal terms The only debatable question, therefore, is whether upon the admitted facts the arbitrators and the trial court erred in classing plaintiff as a contractor. The term is one of very frequent use in common speech, and its meaning has often been considered by the courts. As is not unusual in judicial definitions of even the most familiar words, it has been variously phrased and interpreted, but we think there has been developed no radical difference of opinion as to its substantial meaning or effect. In its broadest sense every person who enters into a contract or takes upon himself contract obligations of any kind is a contractor, but as ordinarily used it is applied to any person "who in pursuit of an independent business undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in all its details; the true test of a 'contractor' appearing to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished." Jann's Adm'r v. McKnight, 117 Ky. 655, 788 S. W. 862; Caldwell v. Railway Co., 161 Ala. 395, 49 South. 674; Halstead v. Stahl, 47 Ind. App. 600, 94 N. E. 1056; Carey v. Jones, 187 Ill. 203, 58 N. E. 347; Humpton v. Unterkircher, 97 Iowa, 514, 66 N. W. 776; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Madix v. Brewing Co., 154 Wis. 448, 143 N. W. 189; Parrot v. Railway Co., 127 Iowa, 419, 103 N. W. 352; 2 Words and Phrases, p. 1534.

[1, 2] Tested by this rule, which seems to fairly reflect the consensus of judicial opinion, there can be little doubt of the correctness of the decision of the trial court in this case. The plaintiff made a specialty of this kind of work, and had supplied himself with substantially all the tools and appliances necessary for the performance of such jobs. His agreement with the defendant was to produce a certain result, to wit, the removal of 62 trees standing on a described tract of ground. The method and manner of their removal was left wholly to his own choice and discretion except that the trees should be "grubbed" where necessary. No right to control or direct the work was reserved to the defendant, though plaintiff says it was understood that he was to keep in front of the steam shovel in order to clear the way for its operation. He was not limited in the time for the performance of the work except as the law implied a duty to complete it within a reasonable period. He controlled his own time, and was in all essential respects his own master, being answerable to the defendant for nothing except the accomplishment of the promised result, the removal of the trees; or, if we go beyond the writing, the removal of the trees in such time as not to delay the operation of the steam shovel with which defendant was doing the grading through the land from which the trees were to be taken. To say that under these circumstances the plaintiff was not a contractor, but an ordinary employee or servant, is quite impossible, unless we are ready to disregard all precedent. The statute must be presumed to have used the word "contractor" in the sense in which the term is commonly employed, and in which it has been defined by the courts, and we are satisfied that plaintiff's own showing brings him very clearly within that class.

This decision is in no way out of harmony with any of the authorities cited by appellant, unless it be Rheinwald v. B. B. & S. Co., 168 App. Div. 425, 153 N. Y. Supp. 598. That decision seems to have been reversed on appeal (see 174 App. Div. 935, 160 N. Y. Supp. 1144), and cannot be considered as of controlling authority.

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The trial court did not err in holding plaintiff to be a contractor, and not an employee within the terms of the compensation act, and the judgment is affirmed.

Ladd, C. J., and Stevens, Preston, and Gaynor, JJ., concur.

SUPREME COURT OF KANSAS.

GADBERRY

v.

HUTCHINSON EGG CASE FILLER CO. (No. 21810.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—IN OR ABOUT FACTORY—ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

In a case under the Workmen's Compensation Act, it was shown that the factory where the plaintiff was employed was located 60 feet distant from another factory; that between them was maintained a runway across which the employees of both factories took material from one to the other; that plaintiff while so engaged was accidentally thrown from the runway and injured. *Held*, that he was injured by an accident "arising out of and in the course of his employment" on, in, or about the factory of the defendant.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DISABILITY—JUDGMENT—FINDINGS.

The special findings of the jury that the extent of plaintiff's disability is "about 50 per cent.," and that he would be able to earn in the future in some other suitable employment "about 50 per cent." of his usual wages, are *held* to be a finding of one-half disability; and where, in such a case, the jury by the general verdict awards damages of about 63 per cent., *held*, that the judgment should be reduced to allow the plaintiff to recover on a basis of one-half disability.

(For other cases, see Master and Servant, Dec. Dig. § 411.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ALLOWANCES—STAY OF EXECUTION.

Under the provision of the Workmen's Compensation Act that, "in fixing the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity" (Gen. Stat. 1915, § 5906), an allowance for hospital charges and medical attendance of a reasonable amount actually incurred by defendant for the benefit of the workman is proper (Bundy v. Products Co., 103 Kan. 40, 43, 172 Pac. 1020), and, where the defendant has been rendered liable for such expenses, the court is justified in ordering a stay of execution until the charges are paid and the defendant is released from liability.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

* Decision rendered, Jan. 11, 1919. 177 Pac. Rep. 834. Syllabus by the Court.

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Appeal from District Court, Reno County.

Action under the Workmen's Compensation Law by Fred Gadberry, a minor, by M. Gadberry, his mother and next friend, against the Hutchinson Egg Case Filler Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

C. M. Williams and D. C. Martindell, both of Hutchinson, for appellant.

James L. Hogin and Roy R. Hubbard, both of Kansas City, Kan., and A. P. Leacy, of Kansas City, Mo., for appellee.

PORTER, J. In an action under the Workmen's Compensation Law (Gen. St. 1915, §§ 5896-5942), plaintiff recovered judgment, and defendant appeals.

[1] Plaintiff was in the employ of the Hutchinson Egg Case Filler Company. That company and the Hutchinson Box Board & Paper Company occupied adjoining tracts of land, upon which their factories were located; a space of about 60 feet separating their main buildings. At each factory there was a platform dock, and these were connected by a runway over which strawboard and other material used in the egg case factory were conveyed from the box board factory. The employees of defendant would go over this runway, where they would get trucks loaded with the strawboard and take them across to the defendant's factory. The runway crossed over a switch track located between the two factories; and, whenever a box car happened to be on the switch track, the floor of the car would be used as a part of the runway, a sheet of steel about six feet square being laid between the car and the defendant's dock, and the space between the car and the box board company's dock being bridged in the same way, so that a continuous passage could be had between the two factories. On the day plaintiff was injured, he was sent to the box board factory to get a truck loaded with straw board weighing about 2,400 pounds, and with the help of an employee of the box board company, was returning by way of the connecting runway, when the sheet of steel between the defendant's dock and the floor of the box car slipped, throwing plaintiff between the car and the dock. The truck fell upon him and he sustained serious injuries.

The defendant demurred to the evidence on the ground that plaintiff was not shown to have received his injuries while "on, in or about" the factory or plant where he was employed. It is urged that the court erred in overruling the demurrer. In view of the undisputed facts, the point hardly rises to the dignity of a serious contention. It cannot be said that the facts bring the case within the doctrine of Bevard v. Coal Co., 101 Kan. 207, 165 Pac. 657, where it was held that a demurrer to the petition was properly sustained because the accident did not occur on, in, or about a mine, within the meaning of the compensation act. In that case the defendant operated two open pit coal mines, a quarter of a mile apart. The workman was a messenger and had left one mine on an errand and had not arrived at the other when he was injured on the premises of a railway company which lay between the two mines.

In another recent case, Hicks v. Swift & Co., 101 Kan. 760, 168 Pac. 905, the same question arose where the injured workman was employed to drive a truck for the delivery of meat from the defendant's packing house in Kansas City, Kan., to its customers in Kansas City, Mo., and was injured by a box of meat falling on him while he was making a delivery several miles from the packing house. It was held that he was not injured on, in, or about the factory where he was employed. In the present case, plaintiff, at the time of his injury, was within a few feet of the dock which was a part of the defendant's factory. Under the instructions of his foreman, he took a previously defined route between the two factories over a connecting-way which was used in his employer's business. We think the

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entire runway from the defendant's factory over to the factory of the box board company was within such close proximty to the defendant's place of business and so used as part of it that if the injury had happened under the same circustance, but on the other side of the box car, or on the other end of the runway, or even on the dock of the other factory, it might well be said that the plaintiff was injured while, in, on, or about the factory and premises of his employer.

[2] The plaintiff was earning, at the time of his injury, a weekly wage of $13. In answer to special questions, the jury found that he was not totally incapacitated, but was incapacitated, to the extent of "about 50 per cent.," and that he will be able to earn in the future in some suitable employment "about 50 per cent." of his former wages. While the record does not show the precise number of days he was totally disabled, it is practically conceded by both parties that he was totally incapacitated for the period of about 26 weeks. Under the statute he was entitled during total disability to one-half his usual earnings, which would amount to $169. It is conceded that the defendant paid him during this period $168.84, which is substantially the full amount for the time he was totally disabled. The jury assessed the amount of his recovery as $1,768.84, less $168.84, or $1,600.

The defendant contends that the special findings show that the general verdict is for an excessive amount. The contention is based upon the two findings of the jury that the extent of the plaintiff's disability is "about 50 per cent." Of course if the jury meant by these findings that he was disabled to the extent of one-half of his earning capacity and would be able to earn in the future in some other suitable employment one-half of his usual wage, the judgment is excessive, because, after allowing for 26 weeks' total disability, there remained 390 weeks for which compensation should be allowed at 50 per cent. of the difference between what plaintiff was earning before the injury and what he would earn afterwards, which would be $3.25 per week, or $1,267.50. The verdict was for $1,600. The plaintiff cites authorities defining the word "about" as meaning more or less than a definite quantity, and holding that there is no fixed rule for determining the degree of contraction or expansion which may be applied to the term "about." It is conceded that the general verdict is based on about 63 per cent. of total disability, and plaintiff insists that, in order to harmonize the special verdict with the general verdict, the expression "about 50 per cent." must be held to include 63 per cent., which is the amount they allowed. We cannot agree with this contention. It is obvious that the jury meant that plaintiff was incapacitated by his injuries 50 per cent., and would be able to earn in the future by some suitable employment that per cent. of his former wages. It is impossible for a jury to determine the precise extent of disability sustained in cases of this kind; it can only be approximated, but where, in attempting to fix the extent of disability, the jury do not state the exact amount of wages which, in their opinion, plaintiff will be able to earn, or the amount of wages he will earn less than his former wages or, in other words, do not fix the amount of his disability in dollars and cents of earning capacity, there is only one way thay can approximate the extent of the disability or loss of earning power, and that is by stating it in the form of a fraction or percentage. When they said "about 50 per cent.," they meant the same as if they had said "about one-half." If they had intended to find the disability to be 63 per cent., they would not have used the expression "about 50 per cent." It is clear that the general verdict is excessive, and that the correct amount is a mere matter of computation.

[3] After the motion for a new trial had been overruled, defendant offered to show that it employed a doctor to attend plaintiff and also became liable for his hospital expenses. The court thereupon ordered a stay of execution on the judgment until it was shown that these bills, to the amount of $216.65, had been paid and the defendant released from

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liability. Without any claim that the services were not rendered or that the charges were not proper, plaintiff prosecutes a cross-appeal based upon the summary manner in which the court disposed of the matter, and contends that it was unfair to him for the court to make the order without the formal introduction of evidence, and also that it was a question which should have been submitted to the jury. The main purpose of calling a jury in a compensation case is to determine disputed questions of fact raised by the pleadings, and the issues are usually confined to the inquiry whether plaintiff's injuries were occasioned by an accident arising out of and in the course of his employment, and particularly to the question of the extent of his disability. No issue was raised by the pleadings involving the right of defendant to have credit for the expenses incurred for medical care furnished the plaintiff. But if the plaintiff received the benefit of the services furnished, justice and fair dealing, as well as the provisions of the statute, require him to credit the judgment with the amount of the expense, or to pay the expense himself. The spirit and purpose of the compensation act will not permit him to take any technical advantage of the manner in which the order was made. In a similar situation in the case of Bundy v. Products Co., 103 Kan. 40, 43, 172 Pac. 1020, the plaintiff was required to remit from the judgment the amount of a like claim under the provisions of section 5906, Gen. Stat. 1915, which declares that—

"In fixing the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity."

To the same effect, see Cain v. Zinc Co., 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251.

The judgment will be modified by reducing it to the amount which the plaintiff is entitled to recover for 390 weeks at $3.25 a week. In all other respects, the judgment and orders of the trial court are affirmed.

All the Justices concurring.

SUPREME COURT OF KANSAS.

WHITE

v.

KANSAS CITY STOCKYARDS CO. (No. 21832.)*

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—PRANKS OF FELLOW SERVANT.

An employer is liable under the Workmen's Compensation Act for injuries sustained by an employee from an electric shock caused by a mischievous prank of his fellow workmen, when it is shown that the perpetration of such pranks had become a custom on the employer's premises, and consequently had become an incident to the employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT—KNOWLEDGE OF FOREMAN—NOTICE TO MASTER—"FOREMAN."

The person designated by the master to direct the work of employees is a "foreman," however limited in other respects his authority may be;

* Decision rendered, Jan. 11, 1919. 177 Pac. Rep. 522. Syllabus by the Court.

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and the knowledge of such foreman that dangerous practical jokes were being perpetrated by some of his employees at the expense of other employees was notice to the master.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, first and Second Series, Foreman.)

Appeal from District Court, Wyandotte County.

Action by W. P. White against the Kansas City Stockyards Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. L. Wood, of Kansas City, for appellant.

J. K. Cubbison and W. C. Holt, both of Kansas City, Mo., for appellee.

DAWSON, J. [1] The plaintiff was given judgment under the workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216) against the defendant, who was his employer. Plaintiff's injuries were occasioned through a mischievous prank perpetrated upon him by some of his fellow workmen. They fastened an electrically charged wire to an iron door on the defendant's premises. Plaintiff had to pass through this door when his day's work was done and when he had washed and dressed to go home. On touching the gate, plaintiff was severely shocked and more or less permanently injured.

It is needless to discuss the question whether plaintiff was injured in the course of his employment. Under not dissimilar circumstances, it has been so held in this state. Sedlock v. Mining Co., 98 Kan. 680, 159 Pac. 9, L. R. A. 1917B, 372; Monson v. Battelle, 162 Kan. 208, 170 Pac. 801, Syl. par. 3; Id., 103 Kan. 470, 173 Pac. 927.

It has also been held that, while ordinarily a master is not liable under the compensation act for injuries to a workman which have been caused through the mischievous pranks and sportive jokes of his coemployees, yet the rule is otherwise where the master has knowingly permitted such mischievous pranks to continue. In such cases the danger of injury becomes an incident of the employment. Stuart v. Kansas City, 102 Kan. 307, 310, 171 Pac. 913.

[2] The serious contention in this case is that the master did not know that such pranks were being perpetrated on its premises. It would not be unjust to say that the master should have known and was chargeable with notice, for this same mischievous and dangerous prank had been practiced frequently on other workmen off and on for several weeks or months before plaintiff was injured. Here, however, it was shown that plaintiff's foreman, the man who directed his work, was one of the perpetrators of the mischief which injured the plaintiff. This foreman knew this particular prank had become a custom on the employer's premises. Defendant contends that this person was not a foreman, but the great weight of the evidence is to the contrary. It is true that this foreman had no general authority, but he was the person whom plaintiff had to obey while in defendant's employment. To that extent he was a foreman, and his knowledge of the electrical mantrap on the door was notice to his principal.

No error appears in the record, and the judgment is affirmed.

JOHNSTON, C. J., and MASON, WEST, and MARSHALL, JJ., concurring.

BURCH and PORTER, JJ., concur on the ground the master was chargeable with notice on account of the notoriety and long continued existence of the practice.

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COURT OF APPEALS OF MARYLAND.

F. B. BEASMAN & CO. ET AL.

v.

BUTLER. (No. 40.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF EMPLOYMENT—QUESTION FOR JURY.

Where a servant employed in work of clearing ground for a United States military cantonment was injured while on his way from sleeping quarters, provided by contractor, to begin work, being run over by a passing motor truck, used by contractor to convey men to work, whether or not accident arose out of and in course of his employment *held* for jury in trial on appeal from award, in view of Workmen's Compensation Law, § 56.

(For other cases, see Master and Servant, Dec. Dig. § (417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EXTRAHAZARDOUS EMPLOYMENT.

Whether a day-laborer engaged in cutting, piling, and burning brush in cleaning a site for a military cantonment was engaged in an "extrahazardous employment" within the meaning of the Workmen's Compensation Law *held* for the jury, in trial on appeal from award; especially in view of section 56.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WILLFUL MISCONDUCT.

Whether a servant was guilty of "willful misconduct" within the meaning of the Workmen's Compensation Law, in attempting to climb onto the side of a motor truck traveling five or six miles an hour *held* for the jury in trial on appeal from award; especially in view of section 56.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —EVIDENCE—REBUTTAL.

In a proceeding to obtain compensation under the Workmen's Compensation Law, where it had been testified in behalf of the employer that servant had willfully attempted to climb the side of a moving motor truck, testimony in behalf of servant that another man had been run over near the place, and about the same time that the servant was injured, was admissable to show that witness of employer was testifying as to the other occurrence.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

Appeal from Superior Court of Baltimore City; Walter I. Dawkins, Judge.

"To be officially reported."

Proceedings under the Workmen's Compensation Act by Ernest Butler to obtain compensation for injuries, opposed by F. B. Beasman & Co., the employer, and the United States Fidelity & Guaranty Company, insurer. There was an award, which was confirmed by the superior court of Baltimore city, and the employer and insurer appeal. Affirmed.

* Decision rendered, Dec. 10, 1918. 105 Atl. Rep. 409.

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Argued before Boyd, C. J., and Briscoe, Burke, Thomas, Pattison, Urner, and Stockbridge, JJ.

Guion Miller, of Easton (Bartlett, Poe & Clagett, of Baltimore, on the brief), for appellants.

Charles W. Main, of Baltimore, for appellee.

URNER, J. The appellee, Ernest Butler, was employed as a day-laborer by F. B. Beasman & Co., contractors, in the work of clearing ground for the United States military cantonment known as Camp Meade. While Butler was on his way from the sleeping quarters, provided by the contractors, to begin work at the place to which he was assigned, his left foot was run over and partly crushed by the wheel of a passing motor truck. The state Industrial Accident Commission, upon application of the injured man for compensation, and after due hearing, decided that the injury arose out of and in the course of Butler's employment, and directed weekly payments of specified amounts to be made to him by his employers and the United States Fidelity & Guaranty Company as their insurer, for the period and according to the rates prescribed by statute. On appeal by the employers and insurer to the superior court of Baltimore city, the award to the claimant was confirmed as the result of the verdict of a jury in his favor. A further appeal, as permitted by law, has brought the case to this court.

[1] The appellants complain, in part, of the refusal by the superior court to grant a prayer by which they proposed to have the jury instructed that there was no evidence in the case legally sufficient to prove that the appellee sustained personal injury through an accident "arising out of and in the course of his employment." Such an instruction could not properly have been granted under the circumstances of this case, in view of the statutory rule relating to the burden of proof in such cases, as construed and applied by this court in recent decisions. It is provided by the Workmen's Compensation Law that in all court proceedings which it authorizes the decision of the state Industrial Accident Commission "shall be prima facie correct and the burden of proof shall be upon the party attacking the same." Code art. 101, § 56. In Jewel Tea Co. v. Weber, 132 Md. 178, 103 Atl. 476, and in Coastwise Shipbuilding Co. v. Tolson, 132 Md. 203, 103 Atl. 478, where the question now under consideration was involved, the trial court was asked to rule as a matter of law that the evidence was not legally sufficient to prove that the claimant's injury arose out of and in the course of his employment, this being one of the statutory conditions for his recovery of compensation, but it was held by the court, in its affirmance of the judgments appealed from, that as the burden was on the appellant to show that the finding of the commission was incorrect, "it was for the jury to determine the question of fact presented by the appeal, and, among them, the question whether the injury sustained by the deceased arose out of and in the course of his employment, * * * and the court was not authorized to say that the appellant had met the burden imposed on it, or to assume a fact to be found by the jury."

In the Weber Case the claim was made on account of the death of a man, employed as a driver and salesman to travel through the country with a team of mules and a wagon, taking orders for and delivering goods, and who was kicked and fatally injured by one of the mules as they were being placed in a stable at the end of a day's work. The claim in the Tolson Case was by a shipyard laborer whose hand became infected as a result of being stung by an insect or pricked by some sharp object as he was in the act of lifting an old piece of piling from the sand in which it was partly imbeded. In each of those cases the question whether the accident arose out of and in the course of the employment had been decided in favor of the claimant by the state Industrial Accident Commission, and

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consequently the burden of proof, as provided by the statute, rested upon the party appealing from that determination. It was clear that the issues of fact there presented could not properly have been withdrawn from the jury at the instance of appellants charged with such a burden. The same ruling is required by the present record.

In this case there is evidence that the claimant was injured at the site of the camp where he was employed, and while going to work from the quarters provided by his employer, along a road made for camp purposes, and that the injury was inflicted by a motor truck used by his employer in conveying men to their places of work on the grounds in process of being cleared. Whether the accident occurring under such circumstances arose out of and in the course of the employment was a question of fact which the appellants were not entitled to have withdrawn from the jury upon the theory that they had met the burden of proving the contrary.

The appellants also sought to have the jury instructed, in effect, that if they should find certain facts, which we have stated, as to the time and place of the accident, then the appellee's injury did not arise out of and in the course of his employment, and he was not entitled to recover. This proposal to direct and control the inference to be drawn by the jury from the facts to which the prayer referred was properly refused.

[2] Another instruction proposed by the appellant, and rejected by the court below, was based upon the theory that there was no legally sufficient evidence that the appellee was engaged in an extrahazardous employment, within the provisions of the statute, at the time he was injured. The work undertaken by the contractors who employed the appellee was to clear the timber off the land on which Camp Meade was to be located. The appellee testified that he had been engaged in cutting, piling, and burning brush and clearing the land, and, as already stated, that the motor truck which injured him was customarily used by his employers on the camp road over which he was going to his work. This evidence as to the nature and conditions of the appellee's service was before the state Industrial Accident Commission when they decided as to the validity of the appellee's claim under the Workmen's Compensation Act. Its decision necessarily involved a determination that his employment was extrahazardous within the meaning of the statute, which, after specifying a large number of occupations as being subject to that characterization, declares that it is intended to apply to all extrahazardous employments in addition to those which it enumerates. While the act does not in terms mention the work of clearing timber from land, it designates the closely related work of lumbering as being extrahazardous. The question whether the appellee's employment was of that character, under all the circumstances, was an issue which he was entitled to have submitted to the jury, especially as the burden was upon the appellant to show that the finding of the commission upon that point was erroneous.

[3] There was evidence, adduced by the appellants, tending to prove that the accident on which the appellee bases his claim was the result of an unsuccessful effort which he is said to have made to climb on the side of the motor truck as it passed him on the roadway. Upon this testimony, which is in conflict with that of the appellee and others, the appellants asked the court below to instruct the jury that, if they found the appellee to have been injured while he was in the act of attempting to board a rapidly moving automobile truck, and if they found such act to have been manifestly dangerous, and not required by his duties or the interests of his employers, then such act constituted willful misconduct which disentitled him to a verdict in his favor.

In the recent case of Baltimore Car Foundry Co. v. Ruzicka, 132 Md. 491, 104 Atl. 167, we had occasion to consider the statutory provision, here also relied upon in support of the prayer last mentioned, that no employee, or his dependents, should be entitled to an award under the Workmen's Compensation Act on account of any injury caused by his

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willful misconduct. It was held in that case, upon the evidence, that the accident in which Ruzicka lost his life was the result of his own negligence in passing between two cars which were about to be moved, but that this act, while very imprudent, could not properly be described as "willful misconduct" because it "lacked the element of deliberate impropriety which those words imply. It was a thoughtless and heedless act, but not a willful breach of a positive rule of conduct or duty." As defined by one of the decisions quoted from in that case, the word "willfull" imports that "the misconduct was deliberate, not merely a thoughtless act on the spur of the moment." If the appellee in the case at bar in fact attempted to climb upon the side of a passing motor truck, which was moving at the rate of five or six miles an hour, according to the testimony, his act was undoubtedly reckless. But it must not be proper to rule as a matter of law that his sudden and heedless effort to board the truck was "willful misconduct" within the adjudicated meaning of those words, and to direct a verdict against him on that theory. By an appropriate instruction the question of "willful misconduct" was submitted to the jury for their consideration. The prayer which would have required them to thus characterize the act referred to was properly rejected.

[4] The only remaining question to be disposed of is raised by an exception to the refusal of the court below to strike out certain testimony offered by the appellee in rebuttal, apparently for the purpose of showing that another accident, resulting in an injury to a man's foot, had occurred on a road at Camp Meade about the same time that the appellee was injured, and that the witnesses for the appellant, who had not definitely indentified the appellee in describing the accident which they observed, must have had reference to the scene and circumstances of the other occurrence. There was no error in this ruling, as the rebuttal testimony had some tendency to support the theory upon which it was introduced.

Judgment affirmed, with costs.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

HALLETT'S CASE.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—CAUSE OF FALL—SUFFICIENCY OF EVIDENCE.

In compensation proceedings for death of woman store employee, evidence *held* to warrant finding of industrial board that employee fell because she struck her toe or heel against outer edge of top of step as she was about to pass through door into employer's store.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—COURSE OF EMPLOYMENT—EVIDENCE.

If deceased employee had fallen and received injury she did while actively engaged in performance of her duties in employer's store, risk and harm of fall would have been risk and hazard of employment, though cause might rest in conjecture.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

* Decision rendered, Jan. 13, 1919. 121 N. E. Rep. 503.

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3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—INJURIES AND DEATH "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Injuries and death from fall sustained by woman store employee when she struck her toe or heel against outer edge of top step as she was about to pass through door into store of employer in coming to work *held* to have arisen out of and in course of her employment.

(For other cases, see Master and Servant, Dec. Dig. 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Superior Court, Suffolk County.

Proceedings by John Lawrence Hallett under the Workmen's Compensation Act, for compensation for the death of Gertrude O. Hallett, employee, opposed by S. K. Dexter Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurer. Compensation was awarded, the award confirmed by the superior court, and from its decree the insurer appeals. Affirmed.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

Qua, Howard & Rogers and Stanley E. Qua, all of Lowell, for appellee.

PIERCE, J. At the former hearing of this case, 230 Mass. 326, 119 N. E. 673, the decree of the superior court was reversed and the case was "recommitted to the Industrial Accident Board to find the cause of Mrs. Hallets's fall." At the rehearing before the Industrial Accident Board the petitioner introduced additional evidence designed to cover the question raised in the former opinion. The board found "that the deceased employee, Gertrude O. Hallett, fell because she struck her toe or heel against the outer edge of the top step as she was about to pass through the door into the store of her employer; * * * no internal cause or personal ailment contributed to her fall, the employee being in good health at the time of the injury. * * * There was nothing about the clothing of the employee which would have a tendency to cause her to catch her foot and trip; the employee did not trip on her dress, nor did her dress and clothing contribute to cause her fall; the carrying of the articles which the employee had at the time of her fall did not contribute to cause the deceased to trip and fall and did not contribute to her injury and death. The employee had not performed any arduous labor on the day on which she fell; she had been walking the short distance from her home to her place of employment, just prior to the injury, and was neither weak nor tired from the walk, which occupied not more than six minutes of her time; the employee did not faint or catch her foot in her clothing and did not fall from any unexplained cause. Weather conditions were fine, the day of the fatality being a pleasant summer's day, not excessively hot, and the weather did not in any way contribute to cause the employee's fall. The steps on which the deceased fell were located in an entrance which was recessed in the front wall of the employer's building; said steps were surrounded on three sides and covered by the employer's building, and they were entirely on the premises of the employer and belonged to him and were in no part on the sidewalk; and at the time of her fall the deceased was returning from her lunch for the purpose of resuming her work for the afternoon."

[1] The testimony of Dickerman that he "was in the store at the time of this accident * * * facing towards the door. He saw Mrs. Hallett approaching from the direction of the station and come up the steps; that when she reached the top steps, he heard a click as though

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she struck her toe or heel. * * * Her feet were on the top step with reference to threshold of the door, when she started to fall; that he couldn't tell what part of the top step it was. Her feet were very close to the threshold inside the edge of the threshold when she fell onto the floor. His impression was that it was the outer edge of the step that she caught her foot or toe on; that her right foot was on the top step and left foot came up, and then he heard this click. He was under the impression that her toe or heel of the left foot caught on the outer edge of the top step, causing her to fall," was ample evidence to warrant the finding "that the deceased employee, Gertrude O. Hallett, fell because she struck her toe or heel against the outer edge of the top step as she was about to pass through the door into the store of her employer." There is evidence in the testimony of the other witnesses to warrant, by a process of elimination, the finding of the board that the fall and death were attributable solely to the catching of the heel or toe of the deceased against the outer edge of the top step.

Upon the foregoing findings, the Industrial Accident Board ruled that:

"The hazard or danger of accidentally falling on said steps as the deceased fell was an incident of her employment on the premises of the subscriber, and was not a danger common to the community; the employee's injury and death arose out of and in the course of her employment, the danger of tripping and losing one's balance and falling as the employee did is reasonably incidental to the act of ascending a flight of granite steps."

[2, 3] The case now comes before this court on an appeal of the insurer from the judgment of the superior court "that the injury and death of the deceased employee arose out of and in the course of her employment."

If the intestate had fallen and received the injuries she did while actively engaged in the performance of her duties, the risk and harm of that fall would have been an incident and hazard of her employment although the cause of her fall might rest in pure conjecture and speculation. Dow's Case, Banker & Tradesman, vol. 24, p. 1046. When the intestate fell she was not in the active performance of her duties, but was upon the premises of the subscriber and in its employment. Sundine's Case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318; Stacy's Case, 225 Mass. 174, 114 N. E. 206. The risk of a fall upon machinery, upon steps or passageways or over obstructions to travel, is a hazard to a degree common to all persons who enter or seek to enter a manufactory or a mercantile building or other building for business or for pleasure. Dow's Case,, supra Sundine's Case, supra; Cox's Case, 225 Mass. 220, 114 N. E. 281; O'Brien's Case, 228 Mass. 380, 117 N. E. 619. See Hewitt's Case, 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B, 249; Donahue's Case, 226 Mass. 596, 116 N. E. 226, L. R. A. 1918A, 215.

It follows that the decree of the superior court must be affirmed.

So ordered.

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SUPREME COURT OF MICHIGAN.

MAY

v.

CHARLES HOERTZ & SON ET AL. (No. 86.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ATTORNEY'S CONTRACTS—APPROVAL.

Under Workmen's Compensation Law, pt. 3, § 5, the approval of the Industrial Accident Board is essential to the validity of agreements between injured servants or their dependents and their attorneys.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

2. MASTER AND SERVANT—RIGHT TO EMPLOY COUNSEL—WORKMEN'S COMPENSATION LAW.

Workmen's Compensation Law, pt. 3, § 5, requiring the Industrial Accident Board's approval of contracts between injured employee's or their dependents, and attorneys presenting their claims, is not violative of Const. art. 2, § 12, relating to suitor's prosecution or defense by attorney of his choice.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—JUDGMENT FOR CLAIMANT'S ATTORNEY'S FEES—"SPECIAL PROCEEDING."

A proceeding before the Industrial Accident Board to fix the amount of fees of claimant's attorneys is a special statutory proceeding and exercise of the police power, and neither the board nor the court upon certiorari can enter judgment for return of excess of fee taken under alleged contract over that approved by the board.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

(For other definitions, see Words and Phrases, First and Second Series, Special Proceeding.)

Certiorari to Industrial Accident Board.

Controversy between Frances May and her attorneys, Thompson & Temple, before the Industrial Accident Board, over the amount of fees due them for their services and expenses in claim for compensation in proceeding under the Workmen's Compensation Law against Charles Hoertz & Son and another. From an order of the Industrial Accident Board, the attorneys bring certiorari. Order affirmed.

Argued before Ostrander, C. J., and Bird, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Ellis & Ellis, of Grand Rapids, for claimant.
Thompson & Temple, of Grand Rapids, for respondents.

STONE, J. This is a controversy between the claimant and her attorneys, Thompson & Temple, relating to the amount of attorney fees due to the latter, for their services and expenses in the litigation of claimant's claim for compensation in Opitz v. Hoertz, 194 Mich. 626, 161 N. W. 866. In that case this court held that the owner of the premises,

*Decision rendered, Jan. 15, 1919. 170 N. W. Rep. 305.

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Brown & Sehler Company, was liable under the Workmen's Compensation Law (Pub. Acts 1912 [Ex. Sess.] No 10). After that case was remanded to the Industrial Accident Board for further proceedings, such further proceedings were had, which resulted in the allowance to claimant, as the dependent of her deceased husband, Fred May, of the sum of $5.54 per week for 300 weeks to be paid by Brown & Sehler Company.

The Industrial Accident Board found that on April 25, 1917, there was due to claimant $642.64 accrued compensation, and on April 30, 1917, Brown & Sehler Company paid said $642.64 to claimant, and she signed a receipt for that sum. The compensation due and to become due for the entire period of 300 weeks aggregates $1,662. Thompson & Temple, claiming that they had a contract with claimant, in and by the terms of which they were to receive from her 25 per cent. of the amount recovered or awarded for their services and expenses, and having said check indorsed by claimant in their possession, caused the same to be cashed, and deducted and kept from the amount 25 per cent. of the entire compensation awarded, or $415.50, as their attorney fees.

Claimant denied that there was any such agreement, or any agreement as to the amount of compensation, and presented to the Industrial Accident Bord her petition, wherein she prayed, among other things, that said board should hear the petition and consider all the facts and testimony that might be produced, and fix the compensation that Thompson & Temple ought to have for their work and expenses, and that an order might be made specifying how much of said $415.50 said attorneys had the right to retain, and how much of it they should pay back to petitioner.

Thompson & Temple answered the petition, setting forth their claim as above stated, alleging that the amount of their fees as agreed upon had been settled according to the terms of the agreement, and paid, and that the transaction was closed.

Testimony was taken, and the matter submitted to the board. The record shows that by stipulation of counsel for the respective parties:

"It was agreed that any of the records and files in the case, including the printed record, could be used by either party on the argument in this case or in their briefs."

The Industrial Accident Board in a written finding reviewed the facts in the case, and said in part:

"It seems to us that the only question in this case is, What was the value of the services performed for Mrs. Frances May by Thompson & Temple as her attorneys? Section 10 of part 3 of the Workmen's Compensation Law provides in part as follows: 'The fees and the payment thereof, of all attorneys * * * for services under this act shall be subject to the approval of the Industrial Accident Board.'

"The board understands this provision to mean that the board has jurisdiction to fix the fees of attorneys as between themselves and the injured employees, or the dependents of injured employees under the Workman's Compensation Law. The attorneys, Thompson & Temple, deny this power of the board and claim in their brief that they had a right to make a 25 per cent, contract with Mrs. Frances May, and that the parties had a right to settle on that basis, and that they did so, and that there is nothing more to the matter. If this were an ordinary contract in an ordinary business transaction between the parties, that view might be correct, but it seems to us that it was the clear intent of the Workmen's Compensation Law, to provide that the amount of attorney fees for injured employees, and their dependents, should be subject to the control of the Industrial Accident Board."

After reviewing the evidence and the files and records before it, the board concluded as follows:

"From all the files, records, proceedings, and testimony in this case, the board finds:

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"(a) That a reasonable allowance to Thompson & Temple, attorneys for Frances May in this case, to cover and pay for all their services, and to pay back any expenses they may have paid out, is the sum of $125.

"(b) That on or about April 30, 1917, said Thompson & Temple retained $415.50 of the money paid to Mrs. Frances May, when they should have retained only $125, so that they have retained $290.50 more than they should have retained.

"(c) That said Thompson & Temple, a copartnership composed of George W. Thompson and Fred C. Temple, should forthwith pay to Frances May the said sum of $290.50.

"(d) That it is the duty of the Industrial Accident Board to pass upon the question of attorney's fees in this case. An order will be entered in conformity with the terms of these findings."

A formal order was subsequently entered, and Thompson & Temple have brought the matter here for review, by certiorari.

There are many assignments of error; but in their brief and upon the hearing before us appellants relied upon the points that there was a contract between the parties, and a settlement, and for that reason the Industrial Accident Board has no jurisdiction in the matter, and it was further contended that, if such power is given to the board by the statute above referred to, the same is unconstitutional and void.

[1] 1. An examination of the record satisfies us that there was evidence to sustain the findings of fact by the board, above referred to.

The Industrial Accident Board did not distinctly find whether or not the contract as claimed by Thompson & Temple with the claimant had been made. Conceding, but not deciding, that said contract was made as claimed by Thompson & Temple, it is not claimed that it was ever approved by the Industrial Accident Board as is required by section 10 of part 3 of the act. The provision of the statute above referred to is plain and unequivocal, and provides in terms that the fees and the payment thereof of all attorneys for services under the act shall be subject to the approval of the Industrial Accident Board. We agree with the conclusion reached by the board that under this provision it has jurisdiction to fix the fees of attorneys as between themselves and injured employees, or the dependents of injured employees, under the Workmen's Compensation Law. This view is not an anomaly; it is in accord with other provisions of the same statute. Section 5 of part 3 of the act is as follows:

"If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the injured employee reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the Industrial Accident Board, and, if approved by it, shall be deemed final and binding upon the parties thereto. Such agreements shall be approved by said board only when the terms conform to the provisions of this act."

We have held repeatedly that the validity and binding force of an agreement between the employer and employee depend upon the approval of the board. A citation of the authorities upon this point is unnecessary We think there is nothing unreasonable or inconsistent with the general terms of the act to hold as we must, that atorney fees for services under the act, in order to be valid and enforceable, must meet with the approval of the Industrial Accident Board. This, in a proceeding like the instant one, gives that board authority and right, upon petition and proper showing, to settle and fix the amount of compensation for services.

[2] 2. Referring to the question of the constitutionality of this provision and of the act generally, we need refer only to the case of Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8, 153 N. W. 49. In that case on page 26 of 187 Mich., on page 55 of 153 N. W., the following language was used by Justice Steere, who wrote the unanimous opinion of this court:

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"It is urged that the clause of the act making attorneys' and physicians' fees in accident claims adjusted under its provisions subject to the approval of the Industrial Accident Board, and providing that no payment under this act shall be assignable or subject to attachment or garnishment, or be held in any way for any debts, is unconstitutional as limiting the right of contract, preventing the injured party from employing an attorney of his choosing. In support of this contention, section 12, art. 2, of the Constitution is cited, which is as follows: 'Any suitor in any court in this state shall have the right to prosecute or defend his suit, either in his own proper person or by an attorney or agent of his choice.'

"The Industrial Accident Board is not, in contemplation of law, a court and a claimant before it for damages resulting from personal injuries is not strictly a 'suitor in any court,' but the right of a claimant to select and employ an attorney or agent to represent him in the matter is recognized by the provision referred to. These restrictions in the act, as applied to those who submit to its provisions by election, certainly cannot be held unconstitutional. They were deemed by the Legislature proper and necessary to safeguard the interests of the class for whose benefit largely this act to 'promote the welfare of the people of the state' was passed; they are germane to the purpose of the act, and in the light of conditions previously existing in litigation over personal injuries to workmen, of which courts of last resort have taken judicial notice in construing workmen's compensation acts, are beneficial and appropriate, if not essential, to an efficient administration of the law.

"We do not deem it necessary to review in detail the underlying reasons which are recognized as fully justifying and sustaining these special provisions, but those interested in that particular will find them graphically elaborated by Judge McPherson in Hawkins v. Bleakley, supra [(D. C.) 220 Fed. 378], and discussed in detail in Cunningham v. Improvement Co., supra [44 Mont. 180, 119 Pac. 554], and also pertinent reflections by Justice Sterling in Ayers v. Buckeridge, [1902] 48 K. B. 57."

[3] It is urged by counsel for appellee that this court should enter judgment in this proceeding, and cause execution to be issued for the amount thereof.

An examination of the statute referred to by counsel satisfies us that this court has no such power. No judgment has been entered in this proceeding, and neither the Industrial Accident Board nor this court has authority to enter a judgment. This is a special statutory proceeding, an exercise of the police power of the state.

The order of the Industrial Accident Board is affirmed, with costs.

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SUPREME COURT OF NEW JERSEY.

MANZIANO ET AL.

v.

PUBLIC SERVICE GAS CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COURSE OF EMPLOYMENT—CIRCUMSTANTIAL EVIDENCE.

In an action under the Workmen's Compensation Act, the servant's death may be determined to have resulted from an accident, and to have arisen out of and in the course of employment, by inferences drawn from circumstantial or presumptive evidence alone.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—SCOPE OF EMPLOYMENT—EVIDENCE.

Facts proven *held* sufficient to warrant an inference that the servant watchman, guarding a trench where gas was leaking, met his death from asphyxiation while engaged in performing duties assigned by the master.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF FACT—AFFIRMANCE.

Where the trial court concluded upon a basis of rational inference, tantamount to legal proof, that servant's death arose out of and in the course of his employment, Workmen's Compensation Act, § 18, requires an affirmance of the judgment.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Certiorari to Court of Common Pleas, Essex County.

Petition under the Workmen's Compensation Act by Josephine Manziano and others against the Public Service Gas Company. The trial court found for petitioner, and the company brings certiorari. Affirmed.

Argued June term, 1918, before Parker and Minturn, JJ.

Harry Heher, of Trenton, for plaintiffs.
Leonard J. Tynan, of Newark, for defendant.

MINTURN, J. The deceased was found dead in a trench in the city of Trenton which he had been employed to guard, and had been guarding during the night. He had been employed by defendant in another capacity during the day, and was put to work on two trenches which had been dug by defendant in an effort to locate leaks in the gas main.

The following facts were inferable from the testimony:

The gas from the leaks permeated the atmosphere to such an extent that the odor of gas could be detected half a block distant. The indensity and volume of escaping gas made standing upon the trench embankment dangerous to employees. The men engaged by day at work in the trenches found existence there uncertain after the lapse of four or five minutes, and they therefore worked in relays, each company being

* Decision rendered, Nov. 29, 1918. 105 Atl. Rep. 484.

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taken out after four or five minutes in order to obtain fresh air by walking about, when they were taken back to relieve the men who had replaced them.

The maintenance of life in the trenches was impossible after six minutes therein, and the inhalation of fresh air before the expiration of that period of time alone preserved the vitality of the men. Those who worked in the trenches by day were not put to work there at night; the deceased was put to work there with instructions to guard the trenches, to keep the guard lights upon the embankments continuously lighted, and generally to protect the trenches from inconsiderate use or observation by the traveling public.

To assist it in this work, the defendant had carefully blockaded the trenches by an accumulation of dirt excavated therefrom, as well as by an accumulation of paving material from the surface of the street, and at each end by a temporary barricade of planking. Four lighted warning lamps were suspended at the trenches, and those, as has been observed, the deceased was expected to watch and keep lighted.

The decedent had been seen by city policemen several times during the night, and they spoke to him of the coldness of the night and the need of an overcoat. He was last seen near the trenches by a patrolman a little after 4 a. m., and he was not seen again until his body was found asphyxiated in the trench about 6 a. m. He was found in a quasi rising posture, nearly on his knees, with his head resting against the embankment as though engaged in an effort to extricate himself. When he was discovered one of the planks forming the barricade was down, and one of the lamps lay unbroken and extinguished on its side on the embankment. The cause of this disorder was not distinctly in evidence.

The petition was filed against defendant, under the provisions of the Workmen's Compensation Act (P. L. 1911, p. 134), and the trial court found for the petitioner, and this writ was allowed to review the correctness of the finding.

[1] The brief of the defendant succinctly places the issue thus presented upon the insistence that—

"The trial court evidently considered that the evidence justified the inference that the decedent's death was accidental, and arose out of and in the course of his employment; but no attempt is made to explain why the evidence in this particular case justifies the inference."

The argument obviously is, and the brief so declares, that, "the evidence must give a substantial support to the finding." If by this be meant that there must be direct viva voce testimony, tending to show the manner in which the deceased met his death, and that a rational inference cannot be drawn from proved facts and circumstances, the contention runs counter to the general rules of evidence, and to the doctrine established by the adjudged cases in this jurisdiction. Circumstantial or presumptive evidence has alway presented a basis for deductive reasoning in philosophy and in every walk of life, as well as in the determination of legal questions, both civil and criminal.

Referring to the character and legal conclusiveness of such evidence as a basis for the solution of civil causes, Mr. Best briefly but comprehensively defines it as "a mere preponderance of probabilities, and therefore a sufficient basis of decision." 1 Best on Evidence, 135; 1 Greenleaf, 15.

It is this preponderance of the aggregate probabilities, judicially termed the weight of evidence, which furnishes the legal standard of proof in civil causes. Discussing this department of proof, Blackstone declares:

"When a fact cannot itself be demonstrated, that which comes nearest to proof of it is proof of the circumstances necessarily or usually attending it; this proof creates a presumption which is relied upon till the contrary is proved." 3 Blackstone, 371.

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Such presumptions are more or less intuitive, and are based as necessary logical deductions and generalizations upon the common experience of mankind from conceded facts.

Treating of the subject, Prof. Greenleaf says:

"They depend upon their own natural force and efficacy in generating belief or conviction in the mind as derived from those connections which are shown by experience, irrespective of any legal relations. These merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever." 1 Greenleaf, Evidence, 50.

Further analyzing the subject, Mr. Best in his treatise states:

"They not only form important links in a chain of evidence and frequently render complete a body of proof, which would otherwise be imperfect, but the concurrence of a large number of them may (each contributing its individual share of probability) not only shift the onus probandi, but amount to proof of the most convincing kind." 2 Best on Evidence, 577.

[2] Explanations may be offered to answer the inquiry as to the manner in which the deceased came to be in the trench. Witnesses testify that he was carefully performing his duty all night until 4 o'clock in the morning, and therefore we may assume that he never left the scene of his employment; a presumption emphasized by the fact that his body was found on the scene of his work. The plank was down, the earth disturbed, and the light was out, and a reasonable inference may be drawn that ex necessitate, inhaling gas all night, he approached the trench to light the lamp, or to do some other necessary act, when, stupefied by the noxious odor, he lost his balance and fell into the hole, and was unable by reason of the stupefaction to extricate himself in time to save his life.

The necessary act of attending to a call of nature apart and away from the scene of his employment, where the master had not furnished the necessary accommodation for the purpose, in reaching which distant place the servant was killed by a passing train, was held not to be so disconnected from his employment as to deprive his representative of the right of recovery. Zabriskie v. Erie R. R., 85 N. J. Law, 157, 88 Atl. 824, affirmed 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315.

[3] In such an environment the natural presumption is that the deceased met death while engaged in his occupation. There was no evidence that between 4 and 6 o'clock in the morning he voluntarily entered the trench for any purpose incompatible with his duty, nor was there evidence that he was non compos or abnormal and unable to appreciate and realize the necessary incidents of the danger which surrounded him, and to guard against the manifest and inherent perils of which he was enjoined to warn the public. In the absence of proof to that effect, the theory of suicide must be eliminated from the case, for the rule seems to be settled that where a person is found dead the presumptions are that his death was natural or accidental, unless the evidence shows him to have been insane, that suicide will not be presumped, and that the fact of death in an unknown manner creates no such presumption. Germain v. Brooklyn Life Ins. Co., 26 Hun (N. Y.) 604; 29 Cyc. 235, and cases cited.

Illustration of the application in this jurisdiction of deductive reasoning from circumstantial testimony are presented in: De Fazio's Estate v. Goldschmidt Co., 87 N. J. Law, 317, 95 Atl. 549; Bryant v. Fissell, 84 N. J. Law, 73, 86 Atl. 458; Muzik v. Erie R. R. Co., 85 N. J. Law, 129, 89 Atl. 248.

In two of the cases cited there was proof only of the death and of the dangerous environment of the deceased, which furnished presumptive or circustantial testimony of the manner of death, by a logical process of rational induction based upon human experience, from which the reasonable inference of the existence of the statutory requirements was de-

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ducible, i. e., that death arose out of and in the course of the employment.

[4] The trial court having thus concluded upon a basis of rational inference, tantamount to legal proof of the fact, the eighteenth section of the Workmen's Compensation Act (P. L. 1911, p. 134) requires the affirmance of the judgment. Bryant v. Fissell, supra; Sexton v. Telegraph Co., 84 N. J. Law, 85, 86 Atl. 451.

We have examined the exceptions to the court's rulings upon disputed testimony, and have concluded that the admission or rejection of the testimony under the well-settled rule applicable to that character of proof was entirely discretionary. Alcott v. Public Service Co., 78 N. J. Law, 482, 74 Atl. 499, 32 L. R. A. (N. S.) 1084, 138 Am. St. Rep. 619.

The judgment will thereof be affirmed.

COURT OF APPEALS OF NEW YORK.

DI SALVIO

v.

MENIHAN CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INJURIES "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where an employee, engaged in marking shoe soles with a rubber stamp, while waiting for work crossed the room to bid good-by to a fellow employee who had been drafted, and while leaning on the fellow employee's bench caught his fingers in an unguarded cogwheel, the accident did not "arise out of or in the course of the employment," within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INJURIES "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

In order that an injury, within the Workmen's Compensation Act, may "arise out of and in the course of employment," it must be received while the workman is doing the duty he is employed to perform and also as a natural incident of the work flowing therefrom as a natural consequence and directly connected therewith.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Chase and Crane, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings under the Workmen's Compensation Act by Angelo Di Slavio to recover compensation for the loss of fingers, opposed by the Menihan Company, employer, and the American Mutual Liability Insurance Company, insurance carrier. From an order of the Appellate

* Decision rendered, Jan. 7, 1919. 121 N. E. Rep. 766.

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Division (170 N. Y. Supp. 1076) unanimously affirming an award of the State Industrial Commission, the employer and the insurance carrier appeal. Reversed.

Jeremiah F. Connor, of New York City, for appellants.
Merton E. Lewis, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

HISCOCK, C. J. We are unable to see how the award in this case can be sustained. As found by the Industrial Commission, the claimant was in the employ of defendant Menihan Company, which was engaged in the manufacture of shoes, and his duties consisted in marking soles with a rubber hand stamp. At the time of the accident he "had crossed the room in which he was working to talk to a fellow employee who had been drafted and who would be required to leave work on account of the draft in a little while. Di Salvio wished to say good-by to the drafted man before he went to the front, and, while leaning on the bench connected with the splitting machine which was being operated by said employee, the right arm * * * was caught in an unguarded cogwheel, and he sustained the injuries * * * (for which the award has been made). At the time that * * * Di Salvio walked across the room to greet his fellow employee, he had finished the work that had been assigned to him and was awaiting the arrival of more work."

[1] In our opinion the accident did not in any degree arise out of or in the course of claimant's employment.

The courts have been liberal, as they should be, in so interpreting workmen's compensation statutes as to extend in many cases the relationship of employee to acts which seemed to be outside of the strict and ordinary lines of duty, as a basis for compensation. In accordance with this policy, it has been held that the accident "arose out of and in the course of employment" where an injury happened to an employee eating his dinner upon his employer's premises in accordance with express permission of the latter or usual custom (Mann v. Glastonbury Knitting Co., 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D, 86): or to a workman on a telegraph line who had taken refuge during a storm under a freight car and had gone to sleep (Moore v. Lehigh Valley R. R. Co., 217 N. Y. 627, 111 N. E. 1092); or to an employee injured while returning from a cabin on the premises of a railroad company to which employees were permitted to go to eat their meals (Earnshaw v. Lancashire, etc., Ry. Co., 5 B. W. C. C. 28); or to an employee injured by a falling wall while he was taking dinner on his employer's premises (Bloyelt v. Sawyer, 6 B. W. C. C. 16); or to a lighterman, who, while waiting for the tide to ebb, went from his barge to a small boat a short distance therefrom to rest (May v. Isom, 7 B. W. C. C. 148); or to an employee who in accordance with a general practice left the composing room where he worked to go upon the roof and get fresh air on a hot night (Matter of Von Ette, 223 Mass, 56, 111 N. E. 696, L. R. A. 1916D, 641); or to an employee engaged in dumping cars who on a cold night during an interval of leisure for the purpose of protection laid down in a position where he was subsequently injured by a moving car (N. W. Iron Co. v. Industrial Commissioner, 160 Wis. 633, 152 N. W. 416); or even to an employee who was injured while getting down from a moving wagon where he properly belonged to pick up his pipe (McLauchlan v. Anderson, 4 B. W. C. C. 376); or to an employee who was injured in attempting to stop the runaway horse of his employer although his regular work was entirely unconnected with horses (Rees v. Thomas, 1 B. W. C. C. 9); or to an employee who as the result of reproof administered in his line of duty to a fellow workman was struck by the latter in the eye (Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A. 344).

And this court perhaps went farther than any of these cases in extending the benefits of a compensation act when it held, as it did, in Mat-

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ter of Waters v. Taylor Co., 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347, that an employee was acting within the scope of his employment so as to be entitled to the benefits of the act when he left his strict line of employment in the attempt to rescue another workman, technically in the employ of an independent contractor, from a danger which threatened his life. We thus held on the broad principle that as between the employee and the employer "it must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employees to stand still while the life of a fellow workman working a few feet away was imperiled by such an accident as occurred here, and it seems to us that the accident arose out of his employment."

In each of these cases an award was sustained because the court was able fairly to say that between the work for which the employee was engaged and the disputed act which led to the accident there was either naturally or as the result of some act of the employer or of custom a real relationship which brought the accident within the range of employment, and therefore it could be said to have arisen, out of and in the course of the employment.

But in the present case we search in vain for any feature or relationship. There was no connection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow employee. This act did not enable him either directly or indirectly, in any tangible sense, the better to perform his work, discharge his duties, or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was justified in taking an unusual step to protect his employer's interests. It was simply and solely the expression of a private desire and the consummation of a personal purpose. However natural and even commendable his act may have been, it was neither beneficial to his employer nor to himself in the way of completing and performing his work.

The impulse may be, not unnaturally, to say in justification of it that an employee ought not to be compelled to stand idly at his post while waiting for work and that claimant's deviation from his proper course was only by a few feet. But these reasons will not stand analysis. So far as the first one is concerned, as has been pointed out, it would doubtless be possible for an employee temporarily out of work, and if he could do so without interfering with his duties, to seek some proper and available place for rest without destroying his relation of employee. And so far as concerns the second one, the conduct of an employee in a crowded machine shop is not to be measured by mere distances. In this case claimant went far enough to exchange a perfectly safe occupation for a condition of danger and accident. After all other considerations, the controlling and inevitable question remains whether it is part of the employment of an employee in a shop, hired to perform simple and fixed duties to leave these and visit his fellow workmen on errands of a purely personal character utterly unconnected with his regular duties. We think that the answer to this question is self-evident unless we are to extend the relation of employment for purposes of the Compensation Act (Consol. Laws, c. 67) over areas which will not only be new but difficult to define by any certain or logical boundaries.

[2] The tests of such a claim as this were succinctly stated by Judge Pound in Matter of Heitz v. Ruppert, 218 N. Y. 148, 152, 112 N. E. 750, 751 (L. R. A. 1917A, 344):

"The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work."

Claimant's injury does not survive these tests and his case comes with-

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in the principles of Matter of O'Toole, 229 Mass. 165, 118 N. E. 303, where it was held that accidental death occurring to a decedent who had temporarily left his employment to talk with a fellow employee about personal matters could not be said to have arisen out of and in the course of his employment so as to become the basis for a claim; of Reed v. Great West, Ry. Co., 78 L. J. K. B. 31, where it was held that an engine driver, who had left his engine while at rest and crossed a siding to receive from a friend a book unconnected with his duties, was not so engaged in his employment that an injury then received by him would be the basis for a claim under the Compensation Act; of Bischoff v. America Car & Foundry Co., 190 Mich. 229, 157 N. W. 34, where it was held that an employee who transgressed his instructions in order to assist a fellow employee in the repair of a machine could not recover compensation for an accident then arising, although the injured employee thought that his acts were for the benefit of his employer; of Smith v. Lancashire, etc., Ry. Co., 1 B. W. C. C. 1, where a ticket collector, having finished his duties, tarried on the footboard of the car for a moment to speak to a passenger and was injured; of Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17, where an employee was injured while conveying some fellow employees in an elevator to their work as a favor to them and which act was outiside of his line of duty was denied workmen's compensation; of Matter of Gifford v. Patterson, Inc., 222 N. Y. 4, 117 N. E. 946, where it is stated that—

"When an employee is injured through some act of his own, not an incident to his employment, and not authorized or induced by his employer in connection with his employment, the injury does not arise out of and in the course of his employment within the meaning of * * * the Workmen's Compensation Law."

We think that the order of Appellate Division and award of the Industrial Commission must be reversed and the claim dismissed, with costs in this court and in the Appellate Division against the Industrial Commission.

Collin, Cuddeback, Hogan, and McLaughlin, JJ., concur.
Chase and Crane, JJ., dissent.
Order reversed, etc.

COURT OF APPEALS OF NEW YORK.

McINERNEY

v.

BUFFALO & S. R. CORPORATION.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —CONCLUSION OF COMMISSION—REVIEW.

The court on appeal from a judgment affirming an award of the Industrial Commission having findings of specific circumstances which gave rise to the accident, these, rather than the general conclusions drawn from them by the State Industrial Commission, are to control.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

* Decision rendered, Jan. 7, 1919. 121 N. E. Rep. 806.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT."

In proceedings for compensation for the death of a car inspector, who while going to his home for his dinner fell from a trestle about half a mile from the place where he stopped work, but within defendant's railroad yards, *held*, that finding that accident arose "out of and in the course of his employment" was unwarranted.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings for compensation by Ellen McInerney, widow of Michael McInerney, deceased, against the Buffalo & Susquehanna Railroad Corporation, employer and self-insurer. From an order of the Appellate Division (170 N. Y. Supp. 1096) unanimously affirming a determination of the State Industrial Commission awarding compensation, the Railroad Corporation appeals. Reversed, and claim dismissed.

Thomas R. Wheeler, of Buffalo, for appellant.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

HISCOCK, C. J. What we regard as the determinative facts which have been found in this case, aside from formal ones, are to the effect that the deceased workman was in the employ of defendant as a car inspector in one of its yards; that he was accustomed to go for his dinner to his home, which was not on the defendant's premises, on week days taking the highway and on Sundays walking on the railroad right of way in order to avoid exposing himself in his working clothes to the view of people on the highway; that he took this route "without objection" on the part of his employer, and in so doing "violated no enforced rule"; that on Sundays he received pay for eleven hours, which included the one which he was permitted to take for dinner; that on the day in question, which was Sunday, as he was thus going to dinner he received injuries causing death by falling from a trestle which was "within the limits of the railroad yards in which yard he performed certain of his duties."

[1] The Industrial Commission further found as a conclusion that the accident to deceased "arose out of and in the course of his employment"; but, since we have findings of the specific circumstances which gave rise to the accident, these are to control, rather than the general conclusion drawn from them by the commission.

[2] Tested by the general character of the undertaking in which the deceased was engaged at the time of the accident, the latter did not arise in the course of or spring out of his employment. Such a trip of an employee as he was taking is not under ordinary circumstances part of the employment. It is true that it has been held many times that, where an employer requests or customarily permits his employees to eat their meals upon his premises or in some place provided for them, the temporary interruption to their work thus caused will not be regarded as terminating their character as employees or as excluding them from the protection of such a law as our Compensation Act (Consol. Laws, c. 67). Highley v. Lancashire, etc., Ry. Co. 9 B. W. C. C. 496, 501; Blovelt v. Sawyer, 6 W. C. C. 16; Morris v. Lambeth Borough Council, 8 W. C. C. 1. This view is in accordance with the rule which prevailed in negligence cases. Heldmaier v. Cobbs, 195 Ill. 172, 62 N. E. 853; Riley v. Cudahy Packing Co., 82 Neb. 319, 117 N. W. 765; Thomas v. Wis. Cent. Ry. Co.,

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108 Minn. 485, 122 N. W. 456, 23 L. R. A. (N. S.) 954. But no case has been cited or found where an employee going for such a purpose to his home or other place selected by him a substantial distance away from the "ambit" of his employment and from the employer's premises has been regarded as so engaged in the latter's business that an accident then happening to him would be held to be one arising out of and in the course of his employment. On the contrary, it has been uniformly held that it did not so arise. Boyd on Workmen's Compensation. § 481; Ruegg on Employers' Liability & Workmen's Compens. 377; Brice v. Lloyd, 2 B. W. C. C. 26; Hoskins v. Lancaster, 3 W. C. C. 476, 478, 479; Hills v. Blair, 182 Mich. 20, 148 N. W. 243. Such an act of the employee lies outside of his employment within the fair applicant of the principles which were laid down in Matter of De Voe v. N. Y. S. Rys., 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A, 250, and does not come within the rule applied in Matter of Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554, where the transportation in the course of which the injury arose was by the contract of hiring expressly "brought within the scope of the employment." This view is also in accordance with the decisions in negligence cases. Wilson v. C. & O. Ry. Co., 130 Ky. 182, 113 S. W. 101; Moronen v. McDonnell, 177 Mich. 691, 143 N. W. 8.

But while not seeming to dispute this general proposition the Attorney General invokes another rule for the purpose of sustaining the present award. This rule is the one that employment for the purpose of a workmen's compensation act, such as ours, does not commence or end at the instant an employee puts his hand to or takes it from his actual work, but includes a reasonable time and space through which he is approaching or leaving his work, and it is argued that under this principle decedent's relation of employee as he departed to his dinner continued down to the point of his accident, and thus gave to the latter the necessary character to make it a basis for compensation. Guastelo v. Mich. Cent. Ry. Co., 194 Mich. 382, 160 N. W. 484, L. R. A. 1917D, 69; Hoskins v. Lancaster, supra; Gane v. Norton Hill Colliery Co., 2 W. C. C. 42, 47.

[3] We do not think that the findings sustain this argument. As already stated, they simply show that at the time the deceased fell he was still "within the limits of the railroad yards in which yard he performed certain of his duties," there being nothing to indicate how far he had proceeded from where he stopped work. The fact that an employee is on the "premises" of his employer when those premises consist of a railroad right of way or yards does not have the significance which it naturally would have in the case of an ordinary manufacturing plant. We know that such rights of way extend indfinitely, and that such yards are of no standard size, but run from small areas to large tracts extending over many miles. Therefore, to say that the deceased was still within the yards where he performed some of his duties in no manner indicates that he was still within that reasonable distance of the point of cessation of his actual work where he would be protected. Nor do we think that this distance and protection would be indefinitely and as matter of course extended simply because the employer permitted him for his own purposes to travel on the railroad right of way instead of taking the usual and safe course by the highway.

Even farther than this, if we should assume that we might look to the evidence in the attempt to imply a finding that would uphold the award, the attempt would in my opinion fail. This evidence would show that the deceased on the occasion in question traveled over 3,000 feet, considerably more than half a mile, from the yard where he stopped work before reaching the trestle where he fell; whereas, it was a much shorter distance to the highway which he ordinarily used for this trip, and although the route which he did take before reaching the trestle crossed two streets which would have led him home. Under such circum-

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stances, we do not think it would have been permissible for the Industrial Commission to find that the deceased at the time of his accident was still within that reasonable distance which the law gave to him for departure from his work.

As has been suggested, it does not seem that the mere fact that the employer suffered the employee for reasons of his own to travel home by the right of way, instead of by the usual and safe highway, should operate to extend the distance through which the employee might travel on an errand of his own before losing his character of employee, and if the deceased while traveling upon the highway and when distant half a mile from his place of work had been injured we suppose it would hardly be suggested that the accident arose in the course of his employment. In the cases which have been called to our attention where the claim of an employee has been sustained under the rule which we have discussed, the accident happened in close proximity to the place of work and while the employee was on the premises of the employer and departing from or approaching his work by a way which had been furnished or adopted by the employer as a usual and customary one. Gane v. Norton Hill Colliery Co., supra; Hoskins v. Lancaster, supra; McKee v. Great North. Ry., Co., 1 W. C. C. 165. See, also, Olsen v. Andrews, 168 Mass. 261, 263, 47 N. E. 90.

On the other hand, the case which of all others is most analogous in its facts to the present one is opposed to an award. Hills v. Blair, 182 Mich. 20, 148 N. W. 243. In that case the deceased workman of the defendant started from a hand car house where the crew stopped at noon to go to his home for dinner. He traveled on the railroad right of way, although a short distance from the starting point a highway crossed the track and thence ran parallel with it. At a distance of 950 feet from the starting point, he was accidently killed by collision with a train. Under a statute like our own on this point, the Industrial Accident Board held that the deceased was still in the employment of the defendant under the rule which has been stated, and made an award. The Supreme Court, however, reversed this action, holding in effect that the deceased could not be regarded as within the rule and still in the employment of the defendant at the time the accident happened. See, also Caton v. Steel Co., 39 Scot. L. R. 762; McLaren v. Caledonian Ry. Co., 5 W. C. C. 492; Walters v. Staveley Coal etc., Co. 4 W. C. C. 303; Gilmour v. Dorman, Long & Co., 4 W. C. C. 279.

For these reasons we think the order of the Appellate Division and the award of the State Industrial Commission must be reversed and the claim dismissed, with costs in this court and in the Appellate Division against the commission.

Chase, Collin, Cuddeback, Hogan, McLaughlin, and Crane, JJ, concur.

Order reversed, etc.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

HOBERTIS

v.

COLUMBIA SHIRT CO., INC., ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —LOSS OF USE OF EYE.

Where an employee, who was near-sighted and had only 50 per cent. vision, lost the use of an eye, it was not error to allow compensation for the loss of an eye, as against a claim that she had lost only 50 per cent. of vision.

(For other cases, see Master and Servant, Dec. Dig. § 385[11¼].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —LOSS OF USE OF EYE—EARNING CAPACITY.

Where an employee with defective vision lost the use of an eye, the wages received by the employee must be considered her wage-earning capacity with defective vision.

(For other cases, see Master and Servant, Dec. Dig. § 385[11¼].)

Appeal from State Industrial Commission.

Proceeding under Workmen's Compensation Act by Allie Hobertis, claimant, opposed by the Columbia Shirt Company, Incorporated, employer and the Zurich General Accident & Liability Insurance Company, Limited, insurer. From an award of the State Industrial Commission, the employer and insurer appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Alfred W. Andrews, of New York City, for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Robert W. Bonynge, of New York City, for State Industrial Commission.

Lyon, J. The claimant lost the use of an eye. She was nearsighted, having not to exceed 50 per cent. vision. The appellants claim she should only be allowed for the loss of one-half vision. The commission made an award for the permanent loss of the use of an eye. From such an award this appeal is taken.

[1] The statute does not provide that the loss of the use of an eye shall be compensated by an award based upon the amount of vision which existed previous to the accident, whether it be 50 per cent. or 80 per cent. of vision lost. It awards specific compensation for the loss of an eye. It is matter of common knowledge that very few persons have complete and perfect vision. The claimant was working with defective vision. So far as appears, her work was entirely satisfactory to her employer, at least so far as the wages she received.

*Decision rendered, January 8, 1919. 173 N. Y. Supp. 606.

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[2] The wages received by her must be considered her wage-earning capacity with defective vision. She lost the use of her eye, such as she had, and is entitled to compensation therefor, based upon her earning capacity.

The award should be affirmed, with costs. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

LAURINO

v.

DONOVAN ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"ARISING OUT OF EMPLOYMENT."

Where cap, found by chauffeur in coal pile on dock 200 feet from garage, around which he was working, exploded in chauffeur's attempt to remove attached wire, injuring fellow chauffeur passing by in discharge of duties, fellow chauffeur's injury was result of accident "arising out of his employment."

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by John Laurino for compensation for injury, opposed by John E. Donovan, employer, and the Travelers' Insurance Company, insurance carrier. From an award of the Industrial Commission for claimant, the employer and insurance carrier appeal. Affirmed.

See also 183 App. Div. 169, 170 N. Y. Supp. 340.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrance, and Henry T. Kellogg, JJ.

Amos H. Stephens, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Robert Bonynge, of New York City, for State Industrial Commission.

LYON, J. This is an appeal from an award of the State Industrial Commission for the loss of an eye. On March 2, 1917, the claimant and one William Earl were employed as chauffeurs by John E. Donovan. They had been that afternoon directed by him to clean up the garage and cars. The premises of the employer consisted of a garage, dock, stable, blacksmith shop, and machine shop. Laurino and other employees of Donovan had been hauling coal to the dock that forenoon. There was

* Decision rendered, January 8, 1919. 173 N. Y. Supp. 619

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a pile of coal on the dock, about 200 feet from the garage. Earl found an explosive cap with a copper wire attachment in the pile of coal. He brought it into the garage and was attempting to remove the wire from the cap, when it exploded and struck Laurino, who was passing in the performance of his work, in the right eye, destroying the sight. The commission awarded Laurino compensation for the loss of an eye, from which award this appeal has been taken.

Upon a former appeal the award was reversed, and the claim dismissed. 183 App. Div. 169, 170 N. Y. S. 340. Upon application the order was modified, and the claim remitted to the commission for a further hearing. The evidence then was that the cap was found somewhere not on the premises of the employer. The evidence now is that Earl found the cap in the employer's coal then on the dock. It was the duty of Earl to acquaint his employer with the fact that he had found the cap in the coal. His failure so to do might result in the cap being put into the furnace of the employer, which might bring about an explosion, severely damaging the employer's property, and endangering life. The appellant contends that the accident did not arise out of claimant's employment. It was, perhaps, careless for Earl to experiment with the cap; but it was neither a sportive nor a willful act. The claimant suffered injury from Earl's acts while claimant was about his employer's business. He was engaged in the discharge of his duties when the explosion occurred. He was injured through the carelessness and neglect of a fellow workman, which was an incidental risk of his employment.

The award should be affirmed. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

MULLEN

v.

LITTLE.*

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—CONTRIBUTORY NEGLIGENCE.

Where ice was being unloaded from sleigh into farm icehouse by means of skid, farm laborer, who was guiding ice down skid, knowing that, when ice entered building, sleigh end of skid was lifted in air, was guilty of contributory negligence in placing foot within skid to release ice, wedged in doorway, where ice could have been released without so doing.

(For other cases, see Master and Servant, Dec. Dig. § 236[13].)

2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Defendant master has burden of proving servant's contributory negligence.

(For other cases, see Master and Servant, Dec. Dig. § 265[14].)

* Decision rendered, January 8, 1919. 173 N. Y. Supp. 578.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—APPLICABILITY—ICE HARVESTING.

Injury to farm hand, assisting in unloading ice from sleigh to farm icehouse, was not within Workmen's Compensation Law, where ice was to be used for farm purposes, and not for pecuniary gain; the injured employee being a farm laborer, under section 3, subd. 4.

(For other cases, see Master and Servant, Dec. Dig. § 363.)

Appeal from Trial Term, Albany County.

Action by John E. Mullen against Charles W. Little. Judgment for plaintiff on verdict of jury, and defendant appeals. Reversed, and new trial granted.

Argued before John M. Kellogg, P. J., and Lyon Woodward, Cochrane, and Henry T. Kellogg, JJ.

Mills & Mills, Albany (Borden H. Mills, of Albany, of counsel), for appellant.

Herman J. Diekman, of Albany (Robert H. McCormic, of Albany, of counsel), for respondent.

COCHRANE, J. This is an action under the Employers' Liability Act (Consol. Laws, c. 31 §§ 200-204), now a part of the Labor Law. Plaintiff was employed as a farm laborer. In the performance of his duties he was injured while filling an icehouse with ice for use on the farm. The ice was being unloaded from a sleigh into the building. It entered the building through a door 2½ feet wide; the bottom of the door being about 2 feet from the ground outside the building. Two logs, about 6 feet long and 30 inches in diameter, were placed in front of the door lengthwise with the building; the width of the logs thus extending about 5 feet in front of the door. The sleigh loaded with ice was backed against these logs. Upon the logs and between the sleigh and the building was placed a skid temporarily improvised for the occasion. It weighed less than 100 pounds and was 7 feet long; consequently about 2 feet of it projected within the building. There was a slight incline from the sleigh to the building. From the doorsill to the bottom of the space within the building was about 6 feet, except that this space was partially filled with ice. The plaintiff testifies that the logs formed a solid foundation for the skid.

At the time of the accident 12 loads of ice had been placed within the building. It was the third day of the work. Usually the plaintiff was assisted by the foreman in unloading. The plaintiff ordinarily stood on the logs outside the skid, which was 2½ feet wide, and guided the pieces of ice as they slid from the sleigh toward the building. The pieces of ice in dimensions were about 26 by 20 inches and 14 inches thick, and weighed from 250 to 300 pounds. The accident occurred while the thirteenth load was being unloaded. Plaintiff at the time was unassisted. The implement with which he was working was an ice tongs. A pike pole was sometimes used, but he says it was not present at the time of the accident. A piece of ice longer than usual slid down the skid and wedged in the doorway as it was entering the building. To release it the plaintiff, standing on the logs by the side of the skid, placed one foot within one of the spaces formed by the longitudinal slats or parts of the skid. When the ice was released, it slid over the 2 feet of the skid projecting within the building, naturally causing the part of the skid outside the building to be projected upward, which it did, throwing plaintiff forward into the building, causing him to be injured.

[1, 2] It is the unqualified testimony of the plaintiff that every piece of ice from each of the 12 previous loads, as it entered the building, caused the end of the skid adjacent to the sleigh to be projected into the

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air; he says as much as 4 or 5 feet. He testifies that, when the first piece of ice was placed in the building, he called the attention of the foreman to the danger, saying: "If it hits you, you will find out." The skid may have been an inadequate appliance; but its inadequacy was fully understood by the plaintiff, as well as the danger arising therefrom. The plaintiff admits that he had previously had much experience in handling ice. Standing on the logs outside the skid, as he had previously done while unloading the 12 loads, he was in a place of safety. No reason is apparent why he could not from that position have released the piece of ice in question when it wedged in the doorway. The extreme width of the skid and of the doorway was only 2½ feet, and a piece of ice 20 inches wide could easily have been manipulated by means of his ice tongs from the side of the skid. Instead of doing so, he placed one foot, not even on the skid, but on the log, in the space between the parts of the skid. This position he assumed with positive knowledge of the natural consequences. It was a matter entirely within his own control. There was no necessity for haste, nor any occasion for excitement, nor anything in the situation to disturb his judgment, or produce a lack of realization of the natural consequences of his act. He was free to determine his position. The logs presented an uneven surface on which to stand; but the fact of their firmness and stability is placed beyond question by the testimony of plaintiff. It seems clear that the task before the plaintiff could readily have been accomplished while he remained standing beside the skid, and that there was no necessity which required him to place himself in a position of known danger. The case is not at all like that of Maloney v. Cunard Steamship Co., 217 N. Y. 278, 111 N. E. 835, cited by plaintiff. There it was necessary for the plaintiff to use the defective appliance in the manner in which he was using it at the time of the accident. Here no such necessity existed. The manner of its use constituted contributory negligence. The burden of establishing contributory negligence was on the defendant, but on the testimony of the plaintiff himself his negligence clearly contributed to the accident.

The plaintiff urges that the question of contributory negligence is eliminated, for the reason that the case falls within the Workmen's Compensation Law (Consol. Laws, c. 67), and, if so, section 11 makes that question unimportant. Ice harvesting is a hazardous employment under that act, but such employment was not in this instance "carried on by the employer for pecuniary gain," within the meaning of the statute (section 3, subdivision 5). The plaintiff was in reality a farm laborer (section 3, subdivision 4), and the ice was being stored for use on the farm, and only as incidental as farm purposes. Hence the case is not within that act.

The judgment should be reversed, and a new trial granted, with costs to the appellant to abide the event. The court disapproves the finding that the plaintiff was not negligent. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

SPERDUTO

v.

NEW YORK CITY INTERBOROUGH RY. CO.*

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—PAYMENT OF AWARDS.

In view of Workmen's Compensation Act, §§ 25, 50, *held*, that it was improper for the state Industrial Commission, pursuant to previous resolution, to require self-insurer, whose solvency was not questioned to pay into the state fund the present value of an award to a widow and children of a deceased employee; section 27 of the Compensation Law, as amended by Laws 1917, c. 705, § 7 contemplating such an order only in a special case and after notice, and the order being also improper in view of the hardship on such insurer because of financial stringency at the time it was made.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

4. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT— VALIDITY.

Workmen's Compensation Law, § 27, as amended by Laws 1917, c. 705, § 7, if authorizing the state Industrial Commission to require mutual insurers and self-insurers, whose solvency was not doubted, to pay into the state fund the present value of future installments of compensation under awards for death claims, is unconstitutional, as discriminating against such insurers and in favor of others, etc.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

6. MASTER AND SERVANT — WORKMEN'S COMPENSATION —INSURANCE FUND—CONSENT TO PAYMENTS.

While Workmen's Compensation Law, § 50, as amended by 1917, c. 705, § 9, provides that the state Industrial Commission may require an agreement on the part of any employer to pay any award computed under section 27 into a special fund or the state fund as a condition to self-insurance, such consent does not require the employer to observe arbitrary and illegal orders of the commission.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

Cochrane and Henry T. Kellogg, J.J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim of Carmela Sperduto, widow of Angelo Sperduto, deceased, for the death of her husband, against the New York City, Interborough Railway Company, employer and self-insurer. From a determination of the State Industrial Commission, made May 21, 1918, requiring the employer and self-insurer to pay into the state fund the present value of the award, the employer appeals. Determination reversed

Argued before John M. Kellogg, P. J., Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.,

* Decision rendered Jan. 8, 1919. 173 N. Supp. 834.

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Alfred T. Davison, of New York City (Addison B. Scoville and E. Crosby Kindleberger, both of New York City, on the brief), for appellant.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Robert W. Bonynge, of New York City, for the Commission.

JOHN M. KELLOGG, P. J. [1] This is an appeal from a determination of the state Industrial Commission, June 28, 1918, requiring the appellant, a self-insurer, to pay in cash to the commission the alleged present worth of the weekly payments directed to be made by an award of March 16, 1918, to a widow during widowhood and to minor children during dependency. The Adams Case, 175 App. Div. 714, 161 N. Y. Supp. 919, and 220 N. Y. 579, 114 N. E. 1046, held that such a direction could not be made with reference to an award to a widow, but after the decision of that case section 27 of the Workmen's Compensation Law was amended by chapter 705 of the Laws of 1917, and the action of the commission is based upon that amendment. We reversed the determination in the Adams Case, upon the ground that there was no legal basis upon which the commission could determine when, if ever, the widow would remarry, and that sections 27 and 25 should be read together, and that the payment of a gross sum was only authorized in exceptional cases where the commission found in its discretion that the interest of justice so required. The Court of Appeals affirmed our decision upon the first ground stated, without considering the second ground. Its decision did not destroy the effect of our decision in that respect. It was content to rest its decision upon the one ground.

[2] In 181 App. Div. 962, 168 N. Y. Supp. 1130, "In the Matter of the Adoption of a Resolution Requiring the Payment into the State Fund of the Present Value of Death Benefits Pursuant to the Provisions of Section 27 of the Workmen's Compensation Law, as Amended by Chapter 705 of the Laws of 1917," the commission asked this court to determine whether the amendment of 1917 applied to awards made before its enactment, and we concluded it did. The Court of Appeals (224 N. Y. 13, 119 N. E. 1027) dismissed the appeal, upon the ground that the resolution presented no matter which the court could pass upon. We are therefore free to consider the effect of section 27, as amended, as applied to the facts in this case.

The commission duly made an award of death benefits of $4.21 per week to the widow, who was then about 41 years of age, during widowhood, and $1.29 per week to each of the four children, during dependency. The awards to the children, under the act terminated respectively when they became 18 years of age. Upon the remarriage of the widow she receives, under the act, two years' compensation, in one sum. The award to each child was 10 per cent. of the weekly wage, and upon the death of the widow any surviving child was thereafter to receive 15 per cent., instead of 10 per cent. The commission has not changed the award, and it stands as its final judgment, and the mandate of the statute, as to the amount which the appellant must pay, and which the widow and children shall receive.

May 21, 1918, the commission adopted a resolution that every mutual association and every self-insurer shall, on or before July 31, 1918, "pay into the aggregate trust fund of the state insurance fund the present value as of that date of the future installments of compensation under every award against such carrier for death claims arising from accidents occurring between July 1, 1917, and December 31, 1917, both inclusive, together with the necessary expense loading thereon," and further provided the manner in which the computation should be made. On June 28, 1918, pursuant to that resolution, the commission directed the appellant to pay into the state insurance fund $5,456.11, which it determined was the net present value of the future installments, together with loading for administration expenses, 4 per cent., $218.24, making the total $5,674.35.

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[3-6] The employer had duly qualified as a self-insurer, and no question was raised as to its ability to meet its obligations as such. No findings of fact that conclusions of law were filed as required by section 23 of the act. There was no hearing or inquiry as to the facts, upon notice, and the defendant did not have a day in court. The determination appealed from, therefore, must rest solely upon the resolution, as the arbitrary act of the commission, based upon no fact with references to this case, except that the defendant is a self-insurer. It is evident that the determination singles out the self-insurer and the mutual insurance association, and arbitrarily requires them to pay a gross sum, while no such requirement is made of the stock companies or the state insurance fund. The terms of the section permit the commutation of all death benefits and other compensation for a period of 104 weeks or more; the resolution applies only to death claims for accidents occurring between July 1, 1917, and December 31, 1917. In cases of total permanent disability section 15 allows to the injured employee two-thirds of the weekly wages for life, which may equal or be greater than the weekly payments to a widow, and may continue for many years. It is difficult to understand why the self-insurer and the mutual association were not required to commute the payments for such an injured employee.

These considerations make it clear that the resolution was not based on any possible feeling of insecurity as to the payments to be made by the self-insurer and the mutual association. If the commission may make such discrimination, the question still remains whether it may act arbitrarily, or whether its discretion must be moved by some fact in the particular case, as we held in the Adams Case; also whether the determination is not an illegal interference with the defendant's property rights.

The amendment to section 27, made in 1917, it is claimed avoids the effect of the decision in the Adams Case. It provides:

"*Depositing Future Payments.*—If an award under this chapter requires payment of death benefits or other compensation by an insurance carrier or employer in periodical payments, the commission may, in its discretion, at any time, any provision of this chapter to the contrary notwithstanding, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more, for which liability exists, together with such additional sum as the commission may deem necessary for a proportionate payment of expenses of administering the fund so created."

The moneys so paid constitute an aggregate and indivisible fund, the employer is to be discharged from further liability, and this fund is to be kept separate from other moneys of the state fund, and the state fund is not liable for any losses or charges against such special fund. The section also provides:

"All computations made by the commission shall be upon the basis of the survivorship annuitants' table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one half per centum per annum."

The commission has exercised very extraordinary powers, which entirely change, in the case of the self-insurer and the mutual insurer, the plan of payment fixed by the Legislature in compensation cases. The theory of the law is that the business, in an easy way, by periodical payments, must bear the losses sustained by the employer or his dependents, and that the losses shall be paid in substantially the manner in which wages were paid, but that the commission may, in a given case, commute the payments to one or more lump sums, in its discretion and in the "interest of justice." The commission has proceeded upon the

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theory that the Legislature has substantially given it the power to reverse section 25 and arbitrarily to make new laws in certain cases—a power which the Legislature has not the authority to give.

If the commission has correctly construed section 27, it is clearly unconstitutional. But the courts will hesitate in construing a statute in a way which makes it unconstitutional, and will go to the limit of construction in sustaining it. Every reasonable intendment is in favor of its validity. There is nothing in the section whch permits the commission to make an omnibus order like the one in question, discriminating against certain employees and certain kinds of insurance. The clause in the section, that the commission may commute one or more awards by one or more resolutions, may be construed as meaning that the commission may hold a hearing on notice, inquire into the facts as to an insurer which may have several awards against it, upon facts similar in their nature, and that an investigation and a separate trial in each of such cases is not necessary. It may have other proper construction, but it was not intended to permit the commission arbitrarily to change the Workmen's Compensation Law, and commute awards, without notice and without hearing, based solely on the kind of insurance accepted.

By section 50 of the act the employer may furnish one of three kinds of insurance: (1) Subdivision 1 provides for insurance in the state fund; (2) subdivision 2 for insurance in a stock company or mutual association authorized by law to transact such business; or (3) subdivision 3, by the employer qualifing, with the approval of the commission, as a self-insurer. The commission has the right to revoke the consent at any time for cause shown. It seems idle for the statute to provide for three kinds of insurance, unless each insurer is to stand in the same position, with equal liability and responsibility. The payments under the act are to be the same, without regard to the kind of insurance furnished. If an extra burden is placed upon the self-insurer and the mutual association, solely because they are such, it is an illegal discrimination and without effect. When United States 4¼ per cent. bonds are selling at a discount; when the best railroad companies in the country cannot borrow money at 6 per cent., and as a favor and in the interest of the public, the government is advancing necessary money to them at 6 per cent., there can be no question but that computing the value of the award on a basis of 3½ per cent. interest, and requiring cash payment within a few days, is a heavy burden. Weekly payments of a small amount are not a serious burden upon a self-insurer, but the requirement that the present value of all future payments shall be made in cash at once would be ruinous.

Laying aside all other considerations, if a sum is payable each week by a business to a woman during her widowhood, it is a grievous burden to compel it to pay the present value of such payments at once in cash. A government, a bank, insurance company, corporation, or individual, cannot ordinarily pay at once the cash present value of all its obligations payable in the future. Credit is the life of business. The extent of the burden cast upon the appellant as a self-insurer, by the determination, is not the only consideration; an important fact is that it is required to liquidate its liability in a manner different from that required of other employers and insurers, and such requirement is based solely upon the fact of self-insurance.

If the commission may be justified, in any case, in casting such a burden upon an employer, there must be facts and circumstances in the case, and shown in the findings, which move and compel its discretion in that respect. Its action cannot be arbitrary. It is said that such commutation makes the employee more secure. The same may be said of insurance in a stock company. But it is not entirely clear that the employee is made more secure. That is a question which the future alone can determine. Disaster may overtake the special fund, unwise

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investments may be made, and the section expressly provides that losses in this fund shall not be made up from the state fund; so that, if there is a deficiency in this fund, the employee must suffer. If, for any reason, the determination or the section should be held invalid as to the employee, then the insurer might be liable under the original award, thus exacting double compensation. It is urged that subdivision 3 of section 50, as amended in 1917, provides that the commission may require an agreement upon the part of the employer to pay any award commuted under section 27 of the act into the special fund, or the state fund, as a condition of self-insurance. That does not mean that the employer must observe every arbitrary and illegal act of the commission, but only its lawful acts. The appellant, upon filing the securities and proofs required by the commission, qualified and was accepted as a self-insurer, January 27, 1914. The commission did not require, and then had no power to require, such an agreement.

Many times it is necessary for the court to determine the probable duration of a life, and it refers to the mortality tables to enable it, with or without other evidence, to determine the question. Such tables, from their public nature and general use, are treated as some evidence, but are not absolutely conclusive. The court may take into consideration any other facts proper to be considered. There are exceptional cases where, by long usage, the courts use certain well-known tables to determine approximately the value of life and other interests. The use of such tables for compulsory adjustment are substantially limited to cases where the court is called upon to marshal assests, or distribute funds in court, which have been brought there in regular course, and the adjustment is a mere incident to the distribution or division. The Code of Civil Procedure and the general rules of practice provide that, where funds are paid into court to be invested for the benefit of a life tenant by the curtesy or in dower, the investment shall be at the expense of such person, but, if he is willing to take a gross sum, it may be computed by the use of the mortality tables, with an interest basis of 5 per centum. Rule 70; Code Civ. Proc. §§ 1569, 1617, 2717. In marshaling the assets of insolvent insurance companies, and in like cases, the courts, in distributing them, compute contingent interests upon the basis of mortality tables. But these are cases where the moneys are actually in the court and the distribution is made necessary by that fact. I know of no case where the court can compel a life tenant, or person entitled to receive an annuity, to receive, or the remainderman to pay, a gross sum in lieu of the life estate, unless such payment is necessary in order to marshal and distribute funds already in court. It cannot compel funds to be brought into court solely for the purpose of the liquidating of future contingent payments.

In dealing with the individual, the state is not all powerful. There are still certain limitations upon its right to interfere with the individual and his property. A person who is competent to do business, and who meets his obligations and does not violate the law, cannot be deprived of his property against his will, except under the authority given by the state Constitution to condemn real property for public use. If he has the life use of certain money, the state, under ordinary circumstances, cannot compel him to take a gross sum in lieu of it, or if he is required to pay a certain sum to an individual during the payment by a gross sum. The rights of parties as fixed by contract and by judgment should stand. If the payment of money depends upon the life or remarriage of a widow, the payor has the benefit of the chance that she may die or remarry at an early date and relieve him of the other payments, and any act of the state which deprives him of that benefit, and gives it to the state or another, is an invasion of his legal rights. The award of the commission, unappealed from, is a final determination of the rights of the parties. The commission, without being called to action by any particular

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fact, arbitrarily determines that the assumed present value of this class of awards must be paid into the special fund, and that the appellant shall not have the benefit which may come from the death or remarriage, but that such benefit shall inure to the special fund. There is no good reason manifest why such order should have been made. If the state concludes that it is unwise to permit an employer to qualify as a self-insurer the act should be amended. The commission should not amend it indirectly by its arbitrary discrimination against such insurers. The state or its commission cannot speculate in the lives or marriage of individuals, or deal in contingencies. If there were a just doubt about the ability of the appellant to meet future payments additional security may be required at any time. If the amount of the present value of the awards were to be deposited in the fund as security, with the right to the insurer to receive the equitable part of the fund released from time to time by the children dying, arriving at 18 years of age, or ceasing to be dependent, or the widow remarrying or dying, the objections to the statute as it is constructed by the commission would be less forcible. But the commutation made is not for the benefit of the employer or the employee, but for the benefit of the state fund administered by the commission.

The appellant is not only required to pay the value of the future payments, but is required to pay 4 per cent. in addition for the purpose of administering the fund. We know of no case where a remainderman is compelled to pay the full value of the life estate and an addition of 4 per cent. for handling of the fund. Rule 70 provides that the life tenant must pay the expense of handling the fund paid into the public treasury for his benefit.

There is no certainty that any widow will remarry. It depends upon so many different and obscure circumstances that a guess can hardly be hazarded. The age, personal appearance, attractiveness, means, acquaintances, opportunity, the personal wishes of the woman, her health, and so many other considerations enter into the question, that there is no substantial basis for a judgment in a particular case whether or not she will remarry. We infer from section 27 that the Dutch Royal Insurance Institution is willing to take chances and wager upon the remarriage of a widow. There is a general understanding that, for a proper consideration, certain companies are willing to wager against any contingency. These are not insurances against an event which must happen, and the time of its happening is the only uncertain question, but are pure gambles whether or not certain things will or will not happen. On the question of remarriage of widows, appellant is solely interested in this particular widow, and it has bound itself to pay to her a certain sum during her widowhood. The continuance of the payments depends upon this widow, and not upon a certain average which may be arrived at as to widows in general. It is a mere guess as to whether this widow will remarry, or when she will remarry, if such an event happens. Here the commission not only has assumed to fix the value of the future payments to the widow, but also of the payments to each of the children, based upon a probable death under 18 years of age and continued dependency. It must have calculated when the lump sum, representing two years' payments, will be paid to the widow if she remarries, and when, if ever, the interest of any of the children will be increased one-half. If the statute is confined to special and extraordinary cases, where a hearing on notice shows that the interest of justice requires a commutation, we are not condemning it. We are only holding that its proper construction cannot justify the resolution or the order in question.

Certain computations, based upon the payments to be made to the widow, show: The payments during widowhood on a 3½ per cent. interest basis with an allowance of two years' pay upon remarriage, would give a value of $3,536.18; upon a 5 per cent. interest basis, of $3,009.54; and upon a 6 per cent. interest basis, of $2,694.29. If the payments to

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the widow are to be during her natural life, the commutation on the basis of 3½ per cent. would be $3,928.50; on a 5 per cent. interest basis it would be $3,263.86; and on a 6 per cent. interest basis, $2,924.88. These figures demonstrate that the interests of justice did not require the commutation in question, and that an unreasonable and unjust burden has been cast upon the appellant.

I favor reversal. All concur, except Cochrane and Henry T. Kellogg, JJ., who dissent.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT

WAITE

v.

E. W. BLISS CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL—DEATH OF CLAIMANT—SUBSTITUTION OF REPRESENTATIVE—STATUTE.

Under Workmen's Compensation Law, § 23, subjecting appeals from determinations of Industrial Commission to practice applicable to appeals in civil actions, following death of claimant, awarded compensation, substitution must be had of representative of estate, before appeal by employer and insurer from award of commission to Appellate Division can be heard.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½].)

Appeal from State Industrial Commission.

Claim for compensation under the Workmen's Compensation Law by Mrs. Emily K. Waite, for death of Harold C. Waite, the employee, opposed by the E. W. Bliss Company, the employer, and the United States Fidelity & Guaranty Company, insurance carrier. From an award of the State Industrial Commission, the employer and insurance carrier appeal. Hearing of appeal suspended.

Argued before John M. Kellogg, P. J., and Lyon Woodward, Cochrane, and Henry T. Kellogg, JJ.

William Dike Reed, of New York City (William Warren Dimmick, of New York City, of counsel), for appellants.

Merton E. Lewis, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

Robert W. Bonynge, of New York City, for State Industrial Commission.

LYON, J. The appeal is not properly before this court for hearing. The commission made the award, of date July 8, 1918, to Harold C.

* Decision rendered, January 8, 1919. 173 N. Y. Supp. 686.

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Waite for 41 weeks, covering the period from August 28, 1916, to June 11, 1917, evidently erroneously stated in the findings as July 11, 1917, and continued the claim for further hearing; the commissioner stating:

"It appearing that Harold C. Waite, claimant herein, died on or about August 9, 1917, said award is directed to be paid to the estate of Harold C. Waite, deceased."

The law and practice of this court requires that, following the death of the plaintiff, a substitution must be had of representative of the estate before an appeal can be heard. It was recently held by the Court of Appeals, in the Matter of the Claim of O'Esau for compensation against E. W. Bliss Co., employer, and Ætna Life Ins. Co., insurance carrier, appellants, 121 N. E. 362, that by section 23 of the Workmen's Compensation Law (Consol. Laws, c. 67), appeals to the Appellate Division, and to the Court of Appeals, from determinations made by the commission, save as in said section excepted, are subject to the law and practice applicable to appeals in civil actions. Furthermore, there is nothing in the case showing that Emily K. Waite was the widow. According to the record, Harold C. Waite was not married.

The hearing of the appeal must be suspended in this court, awaiting such actions as the parties may see fit to take. All concur.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

IN RE WHALEN.*

WHALEN

v.

STANWOOD TOWING CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —ACCIDENT ARISING IN COURSE OF EMPLOYMENT.

Where the captain of tugboat, after being discharged, returned to the boat, ate dinner, and collected his effects, and later his body was found in the vicinity of the pier at which the boat was tied up, evidence *held* insufficient to warrant an award against the employer; it not being shown that he met his death through an accident arising in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim of Ellen Whalen for compensation under the Workmen's Compensation Act against the Stanwood Towing Company, employer, and the New Amsterdam Casualty Company, insurance carrier. From an award of the Industrial Commission, the employer and insurance carrier appeal. Reversed, and claim dismissed.

*Decision rendered, January 8, 1919. 173 N. Y. Supp. 856.

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Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Frederick Mellor, of New York City, for Appellants.
Merton E. Lewis, Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission.

HENRY T. KELLOG, J. The deceased was catpain of a tugboat which was tied up at Pier 11 in the East river. On January 21, 1918, at about 9:30 a. m., he called up the office of his employer. The officer in charge assumed from his talk he was intoxicated, and directed him to come to the office. He attended at about 11:30, was paid off, and discharged. Thereafter, between 11 and 1 o'clock, he was seen in the pilot house of the tugboat, and at this time asked a friend to come abroad for something to eat. The engineer of the tugboat saw him when he came back from the office, at which time he stated that he was through, and had come for his clothes. The engineer had dinner with him, and last saw him at about 1:30 o'clock, when he was still on board, though he had started for the shore. He was never seen alive again. On May 3, 1918, his dead body was found in the river in the vicinity of Pier 11.

If it be considered that, after the discharge of the deceased, his employment continued a reasonable length of time, to enable him to remove his belongings from the boat, it must nevertheless have ceased immediately upon his leaving it. It cannot be inferred that he fell into into the water while in the act of leaving the boat, or prior thereto, rather than that after leaving it he fell from the dock, while proceeding along its edge in an intoxicated condition. Indeed, it would seem that, if he fell while in the act of leaving, the engineer who saw him start for shore would have heard a splash of water when he struck it, or heard him cry for help. Only a mere guess leads to the conclusion that the deceased fell into the water prior to attaining a secure foothold upon the pier. There was no proof, therefore, that the deceased came to his death through an accident arising in the course of his employment.

The award should be reversed, and claim dismissed.

Lyon and Woodward, JJ., concur.

COCHRANE, J. In the absence of substantial evidence to the contrary, the claim comes within the provisions of Workmen's Compensation Law (Consol. Laws, c. 67), § 21. Substantial evidence to the contrary here appears, and with the appearance of such evidence there simultaneously occurs the disappearance of the presumption on which alone the claimant relies. After his discharge from the employment the claimant was entitled to a reasonable opportunity to get his belongings and leave the boat. If he delayed unreasonably, the risk was his, and not his employer's. After returning to the boat he had his dinner thereon, and delayed his departure far beyond the time necessary for that purpose. His presence on the boat when he fell from it into the water, assuming the accident to have happened in that manner, was not incidental to his employment, or to his quitting the employment, but was a fulfillment of a purpose personal to himself. See Matter of Claim of Pope v. Merritt & Chapman Derrick & Wrecking Co., 177 App. Div. 69, 163 N. Y. Supp. 655.

Hence I concur in the result.

John M. Kellogg, P. J., dissents.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT

STATE INDUSTRIAL COMMISSION

v.

YONKERS R. CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—SELF-INSURANCE—CONDITION—AGREEMENT TO PAY COMMUTATION AWARD.

Agreement of employer, under Workmen's Compensation Law, § 50, subd. 3, as a condition of being allowed to carry its own insurance, to pay, when required, the present value of future payments under an award, not applying, when made, to an award of death benefits to a widow, no method of estimating the contingency of remarriage existing, was not enlarged by subsequent amendment of the statute, providing a method of estimating the present value of such an award.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—CONSENT FOR SELF-INSURANCE—REVOCATION—"GOOD CAUSE."

Mere contest by employer of an order of the commission for commutation of an award of death benefit to a widow does not constitute "good cause," within Workmen's Compensation Law, § 50, subd. 3, as amended by Laws 1916, c. 622, empowering the commission to revoke, for good cause shown, its consent for self-insurance.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

(For other definitions, see Words and Phrases, First and Second Series, Good Cause.)

Cochrane, J., dissenting.

Appeal from State Industrial Commission.

The State Industrial Commission, by decision contained in a resolution adopted and filed in its office July 30, 1918, revoked the permission granted by it to the Yonkers Railroad Company to carry its own insurance under the Workmen's Compensation Law, and the Railroad Company appeals. Reversed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Alfred T. Davidson, of New York City, for Appellant.

Robert Bonynge, of New York City, Counsel for Commission, and Merton E. Lewis, Attorney General, for respondent.

HENRY T. KELLOGG, J. This is an appeal from a decision of the commission, revoking a privilege granted to appellant, under subdivision 3, section 50, of the Workmen's Compensation Law (Consol. Laws, c. 67), to carry its own risk of paying compensation. The privilege was granted in July, 1914, upon condition, among other things, that appellant execute a certain agreement. The agreement was entered into on July 2, 1914, and

* Decision rendered, Jan. 8, 1919. 173 N. Y. Supp. 858.

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engaged appellant, when required by the commission, to "pay an amount equal to the present value of the future payments of compensation, under any award made by the commission against us, into the state insurance fund." On December 20, 1917, the commission made an award to the widow and children of a deceased employee of the appellant, who lost his life by an accident growing out of his employment on August 30, 1917. The appellant paid the installments under this award as directed.

On May 21, 1918, the commission passed a resolution requiring all self-insurers and carriers to commute all death benefits under awards for deaths occurring between July 1, 1917, and December 31, 1917, by lump sum payments into the state insurance fund, the amounts to be determined as provided in section 27 of the Workmen's Compensation Law, as amended by chapter 705, Laws of 1917. Accordingly it directed appellant to pay in the sum of $7,534.04 on the award made against it. The appellant declined to pay, and appealed from the order. Thereupon the commission canceled its privilege of self-insurance. That the sole ground of the cancellation was the resistance of the appellant to the order, as shown by its appeal, and its alleged repudiation of its agreement of July 2, 1914, is established by the recitals of the order and the admissions contained in the briefs of counsel hereupon. The question arises whether the commission properly exercised its discretion when it canceled the privilege upon such a ground.

[1] In the year 1914 section 27 of the Workmen's Compensation Law provided for the commutation of awards, in the discretion of the commission, provided "the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies." It was held in Adams v. N. Y. C. & W. R. R. Co., 220 N. Y. 579, 114 N. E. 1046, that it was not possible under this section to compute the value of awards of death benefits to widows, because no method was provided by law for estimating the contingency or remarriage, the occurrence of which would cause their termination, and therefore the commission had no power to commute in such cases. The present value of an award to a widow was then incapable of ascertainment under a contract as under a statute. Therefore the agreement of July 2, 1914, which engaged appellant, when required, to pay "the present value of future payments," did not comprehend commutation of awards to widows. Moreover, the commission had no power to make a contract calling for lump sum, rather than periodic, payments in such cases, for the statute itself continued to require the latter instead of the former. Originally, therefore, the promise of appellant did not cover the commutation of an award like the award it was subsequently required to commute.

In the year 1917 section 27 of the Workmen's Compensation Law was amended, providing a method for the estimation of the present value of awards of future payments to widows, and the commission became empowered to require the commutation of such awards. Chapter 705, Laws of 1917. This statute amended the law as it stood in 1914, but it could not amend the agreement made by the appellant in that year. The terms of the agreement, and the extent of the obligations thereunder, were then fixed, and could not be enlarged without a new promise voluntarily made, however retroactive the amendment may have been to affect the law of cases previously arising. There was therefore no contract by appellant to pay as ordered in the particular instance, and no breach of contract on its part.

[2] The commission has in effect attempted to penalize the appellant for a resort to the courts to test the validity of its order. Even if the contract of appellant were construed to engage it to make payments under the amended law when required, the questions would remain whether that law was valid, and whether the commission had acted within it. Answers to these questions would have to be made before it could be determined that the contract was broken. The appellant had a right to raise these questions, and could not be penalized for so doing.

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The commission had power to revoke its consent for self-insurance "for good cause shown." Workmen's Cmpensation Law, § 50, subd. 3, as amended by chapter 622, Laws of 1916. It was not shown that the financial standing of the appellant was precarious, or that the securities deposited to protect the self-insurance were inadequate. Nor was any other ground proven or taken for cancellation, except the fact that the appellant dared to consent on order of the commission. Had the commission required further securities, or a further agreement, doubtless a failure of appellant to furnish either would have constituted "good cause shown" for cancellation. This course was not followed. We think that good cause has not been shown for cancellation.

The order of the commission should therefore be reversed. All concur, except Cochrane, J., who dissents.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, FOURTH DEPARTMENT.

LINDSTROM

v.

NEW YORK CENT. R. CO.*

1. MASTER AND SERVANT—EXISTENCE OF RELATION.

A servant employed in cleaning fires and coaling locomotives, injured when riding to his work on the master's engine, such being the method of reaching his work provided by the master, was injured while the relation of master and servant existed.

(For other cases, see Master and Servant, Dec. Dig. § 88[7].)

2. COMMERCE—INJURY TO SERVANT—"INTERSTATE COMMERCE."

A servant was engaged in "interstate commerce," under the federal Employers' Liability Act of April 22, 1908 (U. S. Comp. St. §§ 8657-8665), as amended by Act April 5, 1910, where the injury occurred while on his way to work which was in interstate commerce, to which he had been regularly assigned, and which he had been performing for three weeks.

(For other cases, see Commerce, Dec. Dig. § 27[5].)

Foote, J., dissenting.

Appeal from Trial Term, Ontario County.

Action by Fred Lindstrom against the New York Central Railroad Company. From a judgment of the Supreme Court for plaintiff, denying defendant's motion for new trial made upon the minutes, defendant appeals. Judgment and order affirmed, with costs.

Argued before Kruse, P. J., and Foote, Lambert, De Angelis, and Hubbs, JJ.

* Decision rendered, January 15, 1919. 174 N. Y. Supp. 224.

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Harris, Beach, Harris & Matson, of Rochester (Paul Folger, of Rochester, of counsel), for appellant.

W. Smith O'Brien, of Geneva, for respondent.

HUBBS, J. For three weeks before the accident in question the plaintiff had been employed in cleaning fires on locomotives, cleaning out the ash pans, and coaling the locomotives, at the conclusion of their day's run, in preparation for the next day's run. He also had been engaged in cleaning out the ash dump. After a locomotive has been used all day there is an accumulation of clinkers and dirt from the coal, and that has to be removed, the ash can cleaned, and a fresh fire put in for the next day, so that the locomotive will steam properly. That work has to be done every day.

On the night of the accident, the plaintiff went from his home at Phelps on a passenger train to Geneva and left the train at the Y tower near the ash pit at Geneva, where engines were usually cleaned. That ash pit had been out of repair for three weeks, and during that time the locomotives in use at that point had been taken to Thompson's to be cleaned. There were two engines at the Y tower to be cleaned when plaintiff arrived there. The plaintiff and a companion boarded those engines to go to Thompson's to clean and coal them as they had been doing for three weeks before. That was the way provided by the defendant to get the plaintiff from Geneva to the ash pit at Thompson's.

The plaintiff was riding on engine No. 1786, known as a roustabout engine, which was used to draw a stub train from Geneva to Auburn and return. That engine was coupled to engine No. 173, a yard engine. Steam was up on both locomotives. The engines had started on their way, backing up, when they came into collision with another engine, also backing, and the plaintiff was injured.

This action was brought under the federal Employers' Liability Act of April 22, 1908, (35 Stat. 65, c. 149 [U. S. Comp. St. §§ 8657-8665]), as amended by Act April 5, 1910 (36 Stat. 291, c. 143). The trial court submitted to the jury the questions of negligence, assumed risk, and whether or not plaintiff was engaged in interstate commerce. The jury found a verdict in favor of the plaintiff.

The only question we deem of importance here is whether or not the evidence justified the finding of the jury that the plaintiff was engaged in interstate commerce within the meaning of the act in question.

It is undisputed that the defendant was engaged in both interstate and intrastate commerce. The plaintiff had been engaged in cleaning those two two engines each night for three weeks. One of those engines, the one which hauled the stub train between Geneva and Auburn was engaged in interstate commerce. It was admitted upon the trial that the stub train handled interstate freight daily. The other engine was engaged in interstate and intrastate commerce indiscriminately. In the course of his work the plaintiff, ordinarily, would clean those two engines, they would then be run back to Geneva and two other engines would be run over the pit to be cleaned by him. During the time the engines were off the pit, he would shovel the ashes and clinkers out of it.

[1] There can be no doubt but what the plaintiff was in the service of the master when riding to his work at the time of the injury. That was the way he always traveled from Geneva to the pit at Thompson's. It was the way provided by the master and, while going from Geneva to his work on an engine furnished by the master, the relation of master and servant existed and the plaintiff was engaged in performing a duty of his employment. Vick v. N. Y. C. & H. R. R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Vroom v. N. Y. C. & H. R. R. Co., 129 App. Div. 858, 115 N. Y. Supp. 1063, affirmed 197 N. Y. 588, 91 N. E. 1121.

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[2] If the work to which the plaintiff was regularly assigned, which he had performed for the three weeks before his injury and which he intended to perform on the night of his injury, was in interstate commerce, then at the time of the accident he was engaged in interstate commerce.

In the case of Knowles v. N. Y., N. H. & H. R. R. Co., 223 N. Y. 513, 119 N. E. 1023, plaintiff's intestate was engaged in operating a switching engine engaged in moving cars in interstate commerce. He was walking through the defendant's yard on his way to his work when struck by an engine and killed. The court held that, while the deceased was walking through the yard on his way to his work he was performing a duty required of him, a necessary incident of his work, and that when killed he was engaged in performing a duty connected with interstate commerce, within the meaning of the statute in question. That decision was based upon the case of Erie Railroad Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. In that case an employee of the defendant, engaged in both interstate and intrastate commerce, was killed while leaving the yard after his day's work. The court said:

"In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment. * * Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole."

[3] This brings us to the question of whether or not the plaintiff was employed in interstate commerce while engaged in working at the dump pit cleaning engines. It is conceded that one of the engines which he was required to clean was regularly engaged in drawing cars which were used in interstate commerce. The jury could have found from the evidence that some of the engines which the plaintiff was required to clean were engaged in interstate commerce and that part of them were engaged indiscriminately in interstate and intrastate commerce. It does not appear in which kind of commerce the last engine he cleaned was engaged, and it does not appear which engine he would have cleaned first, if the accident had not happened.

In Erie Railroad Co. v. Winfield, supra, the court, after stating that the deceased, an engineer on a switching engine, who was killed while walking through the defendant's yard on his way home after his work was still engaged in interstate commerce said:

"Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance."

Under the reasoning of that case, it would seem that the plaintiff was protected by the act in question while going to his work, if the work which he was engaged in was indiscriminately interstate and intrastate commerce.

This leaves for our consideration the sole question of whether or not the plaintiff, while engaged in doing the work which he was required to do upon an engine engaged in interstate commerce, was himself engaged in such commerce within the meaning of the statute and the decisions thereunder which are binding upon us.

The United States Supreme Court, in the case of Shanks v. D., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 437, L. R. A. 1916C, 797, stated the general rule for determing whether or not one is

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engaged in interstate commerce within the meaning of the Employers' Liability Act as follows:

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion, * * and that the true test of employment in such commerce in the sense intended is: Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

In that case the court held that an employee in a machine shop operated by the defendant to repair parts of locomotives, while engaged in taking down an overhead countershaft, was not protected by the act. The court said:

"Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a road bed, bridge, engine, car or other instrument then in use in such transportation."

The language above quoted would clearly indicate that one employed in keeping in usable condition an engine then in use in interstate transportation would come within the act.

In New York Central & H. R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, the court said:

"If he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

The foregoing statement was obiter dicta, made by way of illustration only, but in making it the court referred to the case of North Carolina Railroad Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, where a fireman had inspected, oiled, fired, and prepared his engine for an interstate run, and was killed while leaving the yard. In that case the court said:

"It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in futuro. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant."

It has also been held, in Walsh v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, that a car repairer, injured while replacing a drawbar in a car then in use in interstate commerce, is entitled to the benefits of the act.

In Guida v. Pennsylvania R. R. Co., 183 App. Div. 822, 171 N. Y. Supp. 285, the Third Department has held that an employee of an electric railway company, while cleaning boilers temporarily withdrawn from active service to be freed of soot and repaired, was, while working inside one of such temporarily idle boilers, engaged in interstate commerce. Justice Lyon said:

"The 12 boilers which were temporarily idle were an indispensable part of the boiler plant, as it was only by freeing them of soot and making the necessary repairs, which could be made only when the boilers had been temporarily withdrawn from active service, later substituting them for 12 boilers then in use, that the efficiency of the plant could be maintained and the transportation system operated. Freeing the boilers of soot was as necessary to make them effective as making needed repairs. The deceased was, therefore, injured while engaged in restoring to efficiency one of the units of an indispensable instrumentality of interstate commerce. He was employed in interstate commerce equally with the employee who was carrying bolts with which to repair the bridge and

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the employee who was tamping the ties. At these times neither the bridge nor the track at the place of the injury was in actual use by interstate trains. Like the boiler, they were, at the places of injury, instrumentalities of interstate commerce. and not less such during temporary periods when they were out of actual use."

If the reasoning and decision in the Guida Case are to be relied upon in the case at bar, then the engines, if they are such instrumentalities of interstate commerce as we believe them to be, were equally such instrumentalities when in use and when on the dump pit to be cleaned and coaled.

The learned counsel for the appellant has urged here, as he did at the Trial Term, that the plaintiff was not engaged in interstate commerce while cleaning engines at the dump pit, even though such engines were regularly used in drawing cars engaged in such commerce. He has cited, as sustaining such position, many cases, but his chief reliance seems to be placed upon the case of Minn. & St. Louis R. R. Co. v. Winters, 242 U. S. 354, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, which holds that a man injured while making repairs to an engine which had been used in hauling both interstate and intrastate cars was not, within the act, employed in interstate commerce. There is, however, a material difference between an engine laid up for repairs with water between its daily runs. The one is withdrawn from service; the other is in service. The court in that case said: "At the moment it was not engaged in either"—referring to interstate and intrastate commerce. However, the court in that case also said:

"An engine as such is not permanently devoted to any kind to traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other."

The appellant contends that the engines in this case were not engaged in interstate commerce within that language, but it seems to us that we here have a different situation. In the first place, we are not dealing with engines undergoing repairs, but with engines in daily use, as above pointed out, and, further, at least one, No. 1785, the rousta. out, was regularly assigned, to a run whereon was handled daily interstate freight. It appears, also, that No. 173, the switch engine, daily handled interstate cars. The Winters Case is distinguished in Guida v. Pennsylvania R. R. Co., 183 App. Div. at page 826, 171 N. Y. Supp. 285.

The following cases turn upon the question of the nature of the servant's work being done at the time of the injury: Illinois Central R. R. Co. v. Behrens, 233 U. S. 473, 34 Sup .Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; C., B & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 660 L. Ed. 941; Shanks v. D. L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Minn & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170,61 L. Ed. 358, Ann. Cas. 1918B, 54; Erie R. Co. v. Welsh, 242 U. S. 303, 17 Supp. Ct. 116,61 L. Ed. 319; Giovio v. N. Y. C. & H. R. R. R. Co., 176 App. Div 230, 162 N. Y. Supp. 1026, affirmed 223 N. Y. 653, 119 N. E. 1044. These cases, so far as they are cited as holding that the nature of the work being done at the instant of the injury is the controlling question. have no application to the facts in this case. The case of Illinois Central R. R. Co v. Behrens is a good example of the class of cases that hold that, where a servant is engaged in both interstate and intrastate commerce indiscriminately, he must, in order to be within the protection of the statute, have actually been engaged in interstate commerce at the very moment of injury.

Here the plaintiff was going to his work. While doing his regular work he would be engaged in both interstate and intrastate commerce. Going on his way to do that work on an engine provided by the de-

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fendant "was a necessary incident of his day's work, and partook of the character of that work as a whole, for it was no more an incident of one part than of the other." This distinction is made very clear in the case of Erie Railroad Co. v. Winfield, supra.

It would be quite unprofitable to review the many cases cited by the appellant. It seems to us, however, that none of them are authority for the proposition that one who is engaged in cleaning and getting ready for the next day's run an engine which is regularly engaged in interstate commerce is not himself engaged in interstate commerce within the meaning of the statute. Had a member of the crew been injured under the circumstances of this case, the case would fall precisely within the holding in the Winfield Case. Plaintiff's work was quite as necessary and important a part of interstate commerce as that of the fireman who shovels the coal into the engine.

It has been held that an employee engaged in cleaning out an ash pit, under the tracks into which locomotives employed in both interstate and intrastate commerce dump ashes, was engaged in interstate commerce, as the keeping of the ash pit clean was required by both kinds of commerce. Grybowski v. Erie R. R. Co., 88 N. J. Law, 1, 95 Atl. 764, affirmed 89 N. J. Law, 361, 98 Atl. 1085 (cited in Guida v. Pa. R. R. Co., 183 App. Div. 824, 171 N. Y. Supp. 285); Cincinnati, etc., R. Co. v. Clarke, 169 Ky. 662, 185 S. W. 94. If those holdings are correct, then the plaintiff was engaged in interstate commerce when injured while on his way to do that work, within the holding in the Winfield Case.

We are satisfied that the plaintiff, at the time he was injured, while on his way to his work on an engine provided by the defendant, was in the service of the defendant; that he was engaged, when doing his regular work, in both interstate and intrastate commerce; that his trip on the engine from Geneva to Thompson's to his work was a necessary incident of his service and of the nature of his work as a whole; and that he was therefore, at the time, engaged in interstate commerce within the meaning of the act and the controlling decisions thereunder.

The judgment and order are affirmed, with costs. All concur, except Foote, J., who dissents upon the authority of Dahler v. Penna R. R. Co., 178 App. Div. 956, 165 N. Y. Supp. 1082, in which motion for leave to appeal was denied by this court (179 App. Div. 961, 166 N. Y. Supp. 1090), and in which the Court of Appeals on October 10, 1917, denied motion for leave to appeal to that court although the case of Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, was called to its attention.

SUPREME COURT OF OKLAHOMA.

FLYNN

v.

PONCA CITY MILLING CO. ET AL. (No. 9499.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—OPINION EVIDENCE—CONSIDERATION BY INDUSTRIAL COMMISSION—VACATION OF AWARD.

In a proceeding under the Workmen's Compensation Law, chapter 246, Sess. Laws 1915, unsworn opinion evidence, given without notice to

*Decision rendered, Dec. 31, 1918, 177 Pac. Rep. 366. Syllabus by the Court.

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the employer or the insurer that it was to be offered to the commission or that it was filed, and without opportunity to interrogate such witness, or to make further proof to controvert such evidence, should not be considered by the commission, and where it appears the findings and conclusion of the commission was based on such opinion evidence the award will be vacated and the cause remanded to the commission.

(For other cases, see Master and Servant, Dec. Dig. §§ 404, 417[9]).

Appeal from State Industrial Commission.

Claim for compensation by Frank Flynn against the Ponca City Milling Company and the Miller's Mutual Casualty Company. From an award of the Industrial Commission in favor of the claimant, the companies appeal. Award set aside, and cause remanded to the commission.

Twyford, Smith and Crowe, of Oklahoma City, for respondents.

OWEN, J. This is an appeal from an award made by the Industrial Commission in favor of the claimant, Frank Flynn.

Flynn claimed to have been injured by a flour truck striking him in the side, which resulted in the formation of an abscess on the side of the chest.

The principal question at issue at the hearing was whether this abscess was the result of the accident. Without notice to either party, a transcript of the testimony was submitted to the medical advisor of the commission, who gave his written opinion to the effect that the abscess probably resulted from the injury. On this opinion the commission based its findings and conclusion. The statement of this physician was not under oath, and neither party to the cause was given an opportunity to interrogate him or offer additional evidence.

The Attorney General has filed a confession of error based on this action of the commission, and a motion asking that the cause be remanded to the Industrial Commission for further proceedings.

The case of Englebretson v. Indus. Accident Com., 170 Cal. 793, 151 Pac. 421, and Pac. Coast Cas. Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24, support the confession filed by the Attorney General.

The confession of error and motion to remand will be sustained. The award will be set aside, and the cause remanded to the Industrial Commission for further proceedings.

All the Justices concur, except Kane and Rainey, JJ., not participating.

SUPREME COURT OF OREGON.

RIDLEY

v.

PORTLAND TAXICAB CO.*

6. MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—JURY QUESTION.

In an action by a taxicab driver, who claimed to have suffered injuries as a result of defective wrench furnished by the employer to enable drivers to replace punctured tires, evidence *held* sufficient to carry the case to the jury.

(For other cases, see Master and Servant, Dec. Dig. § 286[4].)

* Decision rendered, Jan. 14, 1919. 177 Pac. Rep. 429

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7. MASTER AND SERVANT——INJURIES TO SERVANT—WORKMEN'S COMPENSATION.

Cause of action by a taxicab driver for injuries received as a result of a defective wrench furnished by the employer to remove punctured tires, etc., does not fall within the Employers' Liability Act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Department 1.

Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by P. L. Ridley against the Portland Taxicab Company. From a judgment for defendant on directed verdict, plaintiff appeals. Reversed, and remanded for new trial.

The Portland Taxicab Company, the defendant, is a corporation engaged in the taxicab business in Portland. P. L. Ridley, the plaintiff, was an experienced chauffeur, and had been employed by the defendant for about three months as as extra driver. At some time in the evening of October 23, 1916, probably about 8:30 o'clock, the plaintiff was ordered by his employer to answer a call from the Barker Apartments, located at the corner of Twenty-First and Irving streets. Ridley immediately drove to the Barker Apartments; but he "had a blow-out" at about the time of his arrival at his destination. The wheels of the taxicabs operated by the defendant are equipped with demountable rims, so that tires can be changed quickly wherever it becomes necessary to change them. The rim and the tire are held in place on the wheel by three "lugs," as one witness called them, or "worms," as another witness designated them. The taxicab driven by Ridley, like all the others operated by the defendant, was equipped with a jack, a jack handle, and a tire wrench. The tire wrench is like the ordinary brace which is used with a bit, except that the socket, instead of being adjustable, is sized and shaped so as to fit one end or the head of the "lugs" or "worm" which lock the tire and demountable rim to the wheel. The tire wrench is operated on the same principle as an ordinary brace and bit, and to remove a tire from one of defendant's taxicabs the operator uses the tire wrench to loosen the three "lugs" or "worms," and then takes the tire off the wheel. The jack, jack handle, and tire wrench are kept under the front set. The available space under the front seat is not the same in all the cabs. There was a gas tank under the front seat of the car used by Ridley, leaving for the tools "about 7 inches' clearance on the end and about 3 to 3¼ clearance to the front."

The plaintiff stopped his car after the "blow-out." It was dark. The plaintiff says that "this is the first time I had this cab." Ridley testified that he did not know how many tools were "in that tool box," but, to use his language, "All I know, I put my hand in there to find the tools I wanted, the jack, the jack handle, and the wrench." Ridley jacked up the wheel, and then "put the wrench on the first nut, and it slipped off and flew up" when he "put the strain on it," striking him in the eye, breaking his eyeglaesses, and injuring him. The socket in the wrench, according to the contention of plaintiff, had become worn so that, when placed on the end of the "lug" the wrench "would just catch enough so that, when you pulled up on it, it would slip off." A few minutes after the accident Ridley again went to the "tool box" and got another tire wrench, with which he made the tire change without any further difficulty. The plaintiff stated that he did not know that there were two wrenches in the "tool box" when he got the first wrench and the jack.

The complaint avers that the work of changing tires was done "by a wrench furnished by defendant," and then alleges:

"That the wrench furnished by defendant was old, worn, and de-

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fective; that the portion of said wrench which fitted over the nut was old, worn, and defective, and had been used to such an extent that the same was rounded to such an extent that it would not firmly hold the nuts in; that when plaintiff attempted to remove said nut, on account of said wrench being old, worn, and defective, that portion thereof which was used to secure and hold said nut permanently slipped, and the wrench struck plaintiff in the eye; that plaintiff was wearing glasses, and the force of said blow broke both glasses and drove portions of said glass into his right eye.

"Plaintiff alleges that defendant was careless and negligent in the following particulars, to wit:

"(1) That said defendant carelessly and negligently furnished plaintiff wi.h an old, worn, and defective wrench, unsuitable for the purpose of being used as a wrench."

The trial resulted in a directed verdict for the defendant, and the plaintiff appealed.

W. E. Farrell, of Portland (Davis & Farrell and E. K. Oppenheimer, all of Portland, on the briefs), for appellant.

Harrison Allen, of Portland (Griffin, Leiter & Allen, of Portland, on the briefs), for respondent.

HARRIS, J. (after stating the facts as above). Among the reasons urged in the circuit court by the defendant in support of its motion for a directed verdict was the claim that the complaint did not state a cause of action, since the pleading did not contain an allegation that the defendant knew or ought to have known that the tire wrench was defective. The defendant took the position that the words "carelessly and negligently furnished plaintiff with an old, worn, and defective wrench" did not amount to an averment that the employer had knowledge of the alleged defective condition of the wrench. Although the plaintiff insisted that the quoted allegation was equivalent to an averment that the employer had knowledge of the defective condition of the wrench, still, in order to remove any doubt about the sufficiency of the pleading, he requested permission to amend the complaint by inserting the words "of which the defendant had knowledge or should have known under the circumstances." The defendant objected to the proposed amendment. The court expressed a willingness to allow the motion to amend "if it is possible for an amendment to be made at this time"; but, without finally ruling on the motion for permission to amend, the court stated that "nothing could be gained by an amendment as there is no evidence on that point," and for that reason granted the motion for a directed verdict.

Assuming for the purposes of the discussion that the complaint does not allege that the defendant knew or ought to have known that the wrench was defective, and that, on account of omitting this material allegation, the complaint is vulnerable to a demurrer, nevertheless, on the record presented here, it was error to direct a verdict for the defendant.

[1-4] A motion for an involuntary judgment of nonsuit is in the nature of a demurrer to the evidence for the plaintiff. Brown v. Oregon Lumber Co., 24 Or. 315, 317, 33 Pac. 557. The judge is called upon to decide whether there would be a "want of evidence to support" a verdict for the plaintiff, even though all the evidence for the plaintiff is assumed to be true. Section 183, L. O. L. A motion for a directed verdict presents the same question for decision as does a motion for a judgment of nonsuit; but the plaintiff is of course entitled to the benefit, not only of his own evidence, but also to the benefit of any evidence favorable to him, though introduced by the defendant. Huber v. Miller, 41 Or. 103, 110, 68 Pac 400; Merrill v. Missouri Bridge Co., 69 Or. 585, 593, 140 Pac. 439. While a motion for a nonsuit and a motion for a directed verdict give rise to the same inquiry, the result of an approving decision is not the

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same. A judgment of nonsuit operates merely as a dismissal of the action. Section 184, L. O. L.; Malloy v. Marshall-Wells Hdw. Co., 175 Pac. 661. But a judgment on a directed verdict concludes the controversy. Huber v. Miller, 41 Or. 103, 110, 68 Pac. 400. A motion for a directed verdict, as well as a motion for an involuntary judgment of nonsuit challenges the legal sufficiency of the evidence. Each of these motions performs the same function in connection with the evidence as does a demurrer in connection with a pleading; but neither of these motions is designed to perform the function of a demurrer to a pleading.

[5] Even though a complaint omits some material allegation, a motion for a directed verdict, based upon the fact of such omission, should be denied, especially where the objection can be cured by an amendment and the plaintiff's evidence, if true, makes a case against the defendant. Meyers v. Syndicate Heat & Power Co., 47 Wash. 48, 91 Pac. 549; Gerke v. Fancher, 158 Ill. 375, 41 N. E. 982; Cahill v. Illinois Cent. R. Co., 137 Iowa, 577, 115 N. W. 216; Wrought Iron Bridge Co. v. Greene, 53 Iowa, 562, 5 N. W. 770; Austin Western Co. v. Weaver Tp., 136 Iowa, 709, 114 N. W. 189. Of course a different question would be presented, and a different result might follow if the evidence conclusively showed that the plaintiff was without a cause of action. It must be remembered that a judgment on a directed verdict concludes the controversy; and hence, if it is permissible to direct a verdict for a defendant merely because the complaint has omitted some material allegation, which can be supplied by an amendment, and in despite of the fact that the plaintiff has offered evidence which would be sufficient to support a verdict for him, if a accompanied by a good instead of a bad complaint, it would result in defeating the purpose of amendments, and frequently would end in the complete denial of a right by the simple, but indefensible, act of closing the doors to the truth. If, therefore, the record brought to us contains evidence which, when accompanied by a good pleading and if believed by a jury, would be legally sufficient to support a verdict for the plaintiff, then it was error to allow the motion for a directed verdict on account of any failure of the complaint to allege that the defendant knew or ought to have known that it furnished a defective wrench.

[6] There are other facts to be taken into consideration in addition to those already stated. Daniel F. Stewart, the general manager of the defendant, testified that no tools, except a jack and a handle for it and a tire wrench, were furnished for the cabs, because the drivers, if supplied with additional tools, sometimes tampered with the motors. Stewart stated that, besides the tools already named, each taxicab was furnished with chains, which were also kept under the front seat. Ridley testified that, along with the enumerated tools and the chains, "sometimes there is a tire change and something like that" under the front seat. Among the employees of the defendant were a "garage man," a "tire man," and a master mechanic. Stewart told the jury that "the garage man supplies the cars," and he also explained that it was the duty of every driver to report ten minutes previous to the time for his departure, and "to investigate and see whether he has the proper tools, and also the proper amount of air pressure in each of his tires." Ridley stated that he was "hired to drive the car," and while he admitted that there was a "sign on the wall, right where the air pressure gauge is, to put 80 pounds of air in the car before it left there," he denied that his duties included that of ascertaining whether the car was supplied with the proper tools. The plaintiff asserted that a jack and a handle and a tire wrench "are supposed to be in that car all the time." The manager testified that, "when a driver has a wrench out, if he springs it, he brings it back and gives it to the tire man, and the tireman gives him another one, and the old wrench is given by the tire man to the master mechanic, who, after they are sprung, takes that end off and puts on a new end to it." And when the same witness was asked, "Where do you get these wrenches?" he answered thus, "Well,

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the lower part of the wrench there, our master mechanic makes chrome nickel steel." M. J. Marsh said that parts can be welded on a worn wrench, "so that it can be made practically new until it gets worn again," and "that had been done to that particular wrench, but it had worn off again."

The court cannot say as a matter of law that the evidence recorded in the transcript is insufficient to sustain a verdict for the plaintiff. The case presented by this appeal is not entirely like that large class of cases where the employer furnishes a number of tools of the same kind, and the servant is expected to select one of them whenever needed. There is testimony to the effect that each taxicab was always equipped with a fire wrench and a jack, and with no other tools. It is conceded by the defendant that "the garage man supplied the cars." The evidence is conflicting as to whether it was the duty of the plaintiff to see that the garage man had performed his duty. There is evidence relating to the repair of the alleged defective wrench. It was dark when the accident happened. The plaintiff says in substance that each car was supposed to be supplied with a jack and a wrench. When he raised the seat, he found the tools which he expected to find. Ridley says that he did not know that two wrenches were in the "tool box," and he says, too, that he had not driven this car before. If he found what he expected to find, and if he did not know that a second wrench was in the "tool box," and if it was dark, and if he hurried, the court cannot say as a matter of law that Ridley was himself negligent in not observing the defect in the socket of the first wrench, or in not hunting for and finding the second wrench, and using it at the first; nor can the court say as a matter of law that the defendant was or was not negligent.

[7] The trial court correctly decided that the facts did not bring the plaintiff within the Employers' Liability Act (Laws 1911, chapter 3). Inasmuch as we assume that the plaintiff desires to amend his complaint, we do not attempt to decide whether a common-law liability is sufficiently pleaded. The plaintiff may apply to the circuit court for permission to amend the complaint.

The judgment is reversed, and the cause is remanded for a new trial. McBride, C. J., and Burnett and Benson, JJ., concur.

SUPREME COURT OF PENNSYLVANIA.

CATLIN

v.

WILLIAM PICKETT & CO. ET AL.*

1. MASTER AND SERVANT—FINDINGS OF REFEREE AND WORKMEN'S COMPENSATION BOARD.

Under Workmen's Compensation Act June 2, 1915, the courts have no jurisdiction to review findings of referee and workmen's compensation board if there is any evidence to sustain such findings.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

*Decision rendered, Oct. 7, 1918. 105 Atl. Rep. 503.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD TO WIDOW AND CHILDREN.

Under Workmen's Compensation Act June 2, 1913, § 307, if a deceased workman leaves a widow and minor children, an award should be made in favor of the children to begin after the award to the widow ceases, and to continue until each child reaches 16 years of age.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Court of Common Pleas, Washington County.

Claim for compensation under the Workmen's Compensation Act, by Nancy Catlin against William Pickett & Co., employer, and Globe Indemnity Company, insurer. From a judgment dismissing an appeal from decision of Workmen's Compensation Board, affirming the report of a referee allowing the claim, the employer and insurer appeal. Affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Fox, JJ.

John C. Sherriff, James L. Weldon, and Alexander P. Lindsay, all of Pittsburgh, and Donnan & Witworth, for appellants.

C. L. V. Acheson, Acheson & Crumrine, and J. Boyd Crumrine, all of Washington, Pa., for appellee.

SIMPSON, J. A referee under the Workmen's Compensation Act of June 2, 1915 (P. L. 736), found as facts that Charles Catlin was killed while in the employ of William Pickett & Co., the defendant; that Nancy Catlin, claimant, had been duly married to said Charles Catlin, and survived as his widow; and that he stood in loco parentis to John Catlin, the other claimant. The referee thereupon awarded to her compensation at the rate of $5 per week for 300 weeks, and to John Catlin $1.67 per week, to begin after the expiration of the 300 weeks, and to continue until he reached 16 years of age. Defendant appealed to the workmen's compensation board alleging only "errors of law committed by the said referee." The board sustained the referee and dismissed the appeal. Defendant then appealed to the court of common pleas, and that appeal also was dismissed. He then prosecuted the present appeal, and it must share the same fate.

[1] The first two questions argued by appellant are: (a) Was Nancy Catlin the widow of Charles Catlin? And (b) Did he stand in loco parentis to John Catlin? But the assignments of error do not call for their decision. They only deny that Nancy Catlin, though "being the lawful wife of the deceased, and residing with him at the time of his death," and John Catlin though "being a child to whom the said Charles Catlin stood 'in loco parentis' at the time of his death," are either of them entitled to any compensation from defendants. Yet the act distinctly provides for compensation under such circumstances. Moreover, if those findings of fact had been properly assigned as errors, we would have been compelled to hold, under our decision in McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617, that we could not review them. There was evidence to support the findings, and we are without jurisdiction to inquire further.

[2] The question which is squarely raised on the record is this: If both a widow and a dependent minor child survive a workman, killed in the course of his employment, under the Workmen's Compensation Act can an award be made in favor of such dependent minor child, to begin after the expiration of the 300 weeks during which the widow is to receive compensation, and to continue until the child reaches 16 years of age? We think such an award is required under section 307 of said act.

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That section provides for compensation to be paid to a decedent's children, including therein those "to whom he stood in loco parentis," "if there be no widow or widower entitled to compensation," and, subject to certain contingencies, not necessary to be considered here, further provides that payments to children shall continue until each reaches 16 years of age, and as to all others shall continue for 300 weeks. The section then proceeds:

"Should any dependent of a deceased employee die, or should the widow or widower remarry, or should the widower become capable of self-support, the right of such dependent, or such widow or widower, to compensation under this section, shall cease. If the compensation payable under this section to any person shall, for any cause, cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased."

[3] The contention of appellant is that the above-quoted words "for any cause" are to be limited to the causes stated in the preceding sentences. We do not so construe them. An additional word or words would have to be interpolated in order to reach that conclusion, and we are not at liberty to add them, unless it is clearly necessary so to do in order to effectuate the legislative intent. No such necessity exists here. On the contrary, we are convinced that the addition of limiting words would defeat that intent. Compensation to decedent's children until they reach 16 years of age is expressly given "if there be no widow or widower entitled to compensation." At the expiration of the 300 weeks the compensation to the widow or widower "ceases," and because of that "cause" the compensation to children still under 16 years of age arises, with the same effect as if they had "been the only persons entitled to compensation at the time of the death of the deceased."

The judgment is affirmed.

SUPREME COURT OF PENNSYLVANIA.

IRVIN

v.

WILLIAM M. FROST & CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —AWARD TO WIDOW AND CHILDREN.

Under Workmen's Compensation Act, where a deceased workman leaves a widow and minor children an award should be made in favor of children to begin after award to the widow ceases and to continue until each child reaches 16 years of age.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Superior Court.

Proceeding by Louisa Ida Amelia Irvin against William M. Frost & Co. and the Fidelity & Casualty Company of New York for compensation under the Workmen's Compensation Act. From a judgment of the Superior Court (68 Pa. Super. Ct. 456), affirming a judgment of common

* Decision rendered, Oct. 7, 1918. 105 Atl. Rep. 504.

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pleas, No. 3, Philadelphia County, dismissing appeal from Workmen's Compensation Board, affirming report of referee allowing the claim, defendants appeal. Affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Fox, JJ.

J. C. Sherriff, of Pittsburgh, and William G. Wright, of Philadelphia, for appellants.

William A. Schnader, of Philadelphia, for appellee.

SIMPSON, J. The only question raised in this case is this: Where a workman, who was killed in the course of his employment, leaves surviving him a widow and dependent minor children, can an award be made in favor of such minor children, under the Workmen's Compensation Act of June 2, 1915 (P. L. 736), to begin after the expiration of the 300 weeks during which the widow receives compensation, and to continue until each child reaches the age of 16 years? The referee, the workmen's compensation board, the court of common pleas, No. 3, of Philadelphia county, and the Superior Court (Irvin v. Frost, 68 Pa. Super. Ct. 456), in this case, have all answered that question in the affirmative, and we do likewise for the reason set forth in our opinion in Catlin v. Pickett, 262 Pa. 351, 105 Atl. 503.

Judgment is affirmed.

SUPREME COURT OF RHODE ISLAND.

NEWTON

v.

RHODE ISLAND CO. (No. 416.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"DEPENDENCY"—HOW DETERMINED.

Workmen's Compensation Act, by "dependency" means a reliance for support upon workman's earnings at time of injury resulting in death, and not at any time thereafter.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependency.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —AWARD ABSOLUTE.

Nothing in Workmen's Compensation Act authorities award to dependent widow of workman to be made upon conditions.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"DEPENDENCY"—HOW DETERMINED.

In view of Workman's Compensation Act, art. 3, § 14, and article 2, § 25, and of fact that no provision is made in act that remarriage of de-

* Decision rendered, Jan. 10, 1919. 105 Atl. Rep. 363.

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ceased workman's dependent widow shall excuse further payments, where court awarded 300 weeks' compensation, widow's remarriage did not entitle employer to vacation of award to her.

(For other cases, see Master and Servant, Dec. Dig. § 393.)

Case Certified from Superior Court, Providence and Bristol Counties.

Proceedings by Ethel Newton for workmen's compensation on account of death of her husband, James E. Newton, opposed by the Rhode Island Company, employer. On application by employer to vacate decree for claimant. Case certified on questions of law. Questions answered, and case certified to superior court.

Fitzgerald & Higgins, of Providence, for petitioner.

Clifford Whipple and Earl A. Sweeney, both of Providence, for resondent.

SWEETLAND, J. The above-entitled proceeding is a petition under the Workmen's Compensation Act filed in the superior court October 16, 1915. The petitioner therein claimed compensation for loss arising from the death of her husband, James E. Newton; which death resulted from a personal injury received by him through accident arising out of and in the course of his employment with the respondent, the Rhode Island Company. On January 16, 1916, by decree of the superior court it was adjudged that the petitioner was wholly dependent upon the earnings of the deceased at the time of said injury, and the respondent was ordered to pay to the petitioner as compensation the sum of $7.64 per week for a period of 300 weeks from May 22, 1915, the date of said injury. On November 29, 1916. the respondent, the Rhode Island Company, filed in the superior court its application asking said court to vacate or modify said decree for the reason that the petitioner on August 22, 1916, was legally married to one Nathaniel Major, Jr., and by virtue of said marriage ceased to be dependent for her support, within the meaning of the Workmen's Compensation Act, upon any other source of income than the earnings or income of said Nathaniel Major, Jr. At a hearing upon said application in the superior court, it appeared that the petitioner had remarried as set out in the application.

The case is before us upon certain questions of law certified by the superior court to this court for its determination. By reason of our decision upon the first of said questions, a consideration or determination of the others becomes unnecessary. The first of the questions certified is as follows:

"First. Did the obligation of the respondent, the Rhode Island Company, to pay compensation to the petitioner, cease by reason of the petitioner's second marriage?"

The application of the respondent is based upon its contention that the provision in favor of the petitioner contained in said decree arose out of her dependency upon the earnings of James E. Newton; that when she remarried her status changed, and her former dependency should no longer be considered as the basis of any claim against the respondent; that after her second marriage she became wholly dependent upon the obligation of her present husband to provide for her support; and any benefit arising to her under said decree as widow of James E. Newton terminated.

[1] The rights of the parties in the premises are wholly dependent upon the provisions of the Workmen's Compensation Act. Chapter 831, Pub. Laws, approved April 29, 1912, and the amendments and additions thereto. Unless said act expressly or by necessary implication authorizes the superior court to modify its decree upon the second marriage of the petitioner and because of such marriage, the question propounded must

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be answered adversely to the respondents. The provisions of the act justify the respondent's contention that in passing upon the petitioner's claim for compensation her dependency was the point of supreme importance. By "dependency," however, the statute clearly intends a reliance for support upon the earnings of a workman at the time of the injury which results in his death, and not at any time thereafterwards. Manifestly no one can be regarded as a person dependent upon the earnings of a deceased workman after his death. It was therefore to the time of the injury alone that the superior court was to look in determining who, if any, of the members of James E. Newton's family or next of kin, should be regarded as his dependent or dependents according to the terms of the statute. The superior court found and decreed that the petitioner was at the time of the injury wholly dependent upon the earnings of said Newton for her support. No appeal was taken from this decree; and the standing of the petitioner became fixed as the dependent of James E. Newton, and the person entitled to compensation from the respondent in the amount and for the period fixed by statute. It seems clear that during the lifetime of the petitioner, within the period named in the decree, her status in that regard, depending upon a finally adjudicated fact, cannot be changed by extraneous happenings.

[2, 3] The terms of the decree in question, with reference to said payments, were unconditional; and there is nothing contained in the statute which authorized the superior court to make them otherwise. In providing for payments to the dependents of deceased workmen extending over so long a period as 300 weeks, we are justified in believing that the General Assembly, in passing the act, could not have been unmindful of the possibility that during such period a change might happen in the financial circumstances of a petitioner found to be dependent; and that, by reason of remarriage or the acquisition of other and ample means of support, the former dependent might become entirely independent of the compensation decreed in his or her favor. Nevertheless, the Workmen's Compensation Act contains no provision that, in the event of such change, there should be a modification of the decree which by its terms is absolute and unconditional. The legislative intent is by no means clear that, if the payments under the decre are no longer a necessary part of the petitioner's means of support, such payments should be discontinued. The absence of provision to that effect in the act leads rather to the opposite conclusion. A conclusion, adverse to the respondent's contention, is supported in some degree by an examination of certain provisions of the act. Section 14, art. 3, provides that within two years after the entry of a decree fixing compensation for an injured employee, who has not deceased, and before the expiration of the period for which compensation has been granted, upon the application of either party on the ground that the incapacity of the injured employee has subsequently ended, increased, or diminished, said decree may be reviewed by the superior court and modfied or vacated in accordance with the facts. The General Assembly in said section was dealing with the subject of the review, vacation, or modification of decrees entered under the act; but it failed to provide for the review, modification, or vacation, of a decree in favor of the dependents of a deceased employee in the event of a subsequent change in the financial circumstances of such dependent. Section 25, art. 2, provides that, in case payment of compensation has continued for not less than six months, the superior court may upon the application of either party order the commutation of the future payments to a lump sum in accordance with the method set out in said section. This provision, in the case of weekly payments decreed in favor of a dependent, is somewhat inconsistent with the view that the decree for weekly payments, at any time during the period for which such weekly payments have been awarded, may be vacated or modified because the necessities of the dependent have changed by reason of a change in his or her condition. For this court to adopt

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the position of the respondent and to hold that, notwithstanding the silence of the statute in that regard, the remarriage of the petitioner or a favorable change in her financial condition warranted a modification of the decree to conform to what must have been the intent of the General Assembly, though such intent is not specifically expressed in the act, would amount to judicial legislation on the part of the court.

The respondent has called to our attention the opinion of a justice of the common pleas court of New Jersey which appears in 39 N. J. Law J. at page 170. In that case the justice held that the nature and purpose of the New Jersey Compensation Act (P. L. 1911, p. 134, amended by P. L. 1913, p. 309) "was to provide for payments to take the place of the earnings of the injured workman if alive, or to be for the benefit of his actual dependents, if dead during the temporary period of readjustment made necessary as a result of the accident." Said justice further held that a dependent widow of a deceased workman upon her remarriage ceased to be a dependent within the meaning of the act and had no right to further compensation thereunder.

We find little authority, upon the question now before use, in the reports of the decisions of the appellate courts of England and the courts of last resort in this country. In Pryce v. Penrikyber Navigation Co., 1 K. B. Div. 1902, p. 221, the Court of Appeals was considering the claim of an employer that the widow of a deceased workman should not be considered as wholly dependent upon the earnings of her husband at the time of his death because personal estate of the value of £100, belonging to the husband in his lifetime, passed to his widow upon his death. In the discussion of this point, Collins, M. R., said:

"Where the deceased's earnings were the only source of support and the widow was wholly dependent upon them at the time of the death of the husband, the condition at the time of the death governed, and not the conditions which arise afterwards."

In the case of Adleman v. Ocean Accident & Guaranty Corporation, 130 Md. 572, 101 Atl. 529, Ann. Cas. 1918B, 730, before the Court of Appeals of Maryland, it appeared that a partly dependent sister of a deceased workman, in whose favor a decree had been entered, married subsequent to the death of the employee; and the employer filed a petition praying that the compensation awarded her be abated from the date of her marriage The Workmen's Compensation Act of Maryland (Laws 1914, c. 800, § 42), unlike the Rhode Island act, specifically provides that

"In case of the remarriage of a dependent widow of a deceased employee without dependent children, all compensation under this act shall cease."

But the Maryland act has no similar provision with reference to compensation granted a dependent sister. The employer urged, however, that upon analogy the court should hold that compensation awarded a dependent sister should also cease upon her marriage. In discussing this claim the court said:

"But there is no such provision in reference to other dependents mentioned in the act, and it is reasonable to conclude that if the Legislature, while dealing with the subject of abatement of compensation, had intended the compensation provided for a sister to abate upon her marriage, it would have so declared in plain terms."

It thus appears that the court determined the question before it, not in accordance with what might be regarded as the purpose of the Compensation Act, but in strict conformity with its express terms.

An authority directly in point is Bott's Case, 230 Mass. 152, 119 N. E. 755. The Massachusetts Workmen's Compensation Act (Laws 1911, c. 751, amended by Laws 1912, c. 571), like our own, contains no provision for the modification, of a decree awarding compensation to the dependent widow of a deceased workman in the event of her remarriage. In the Bott's Case it appeared that the dependent widow of a deceased em-

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ployee to whom compensation had been awarded in accordance with the terms of the act, during the period covered by the award, married a man whose earnings were sufficient for the support of both of them. The court held that it was manifest from the facts found that the woman was no longer dependent for her support upon the payments received under the act. The court said:

"The ascertainment of dependents is made as of the time of the injury to the deceased employee. It cannot be made as of any other time. * * * No provision is made by the act for inquiry into any subsequent change in her condition of dependency. She may become heiress to a fortune after his death, and thus be utterly independent of the payments provided by the act. But there is no provision for an adjudication of that fact. * * * Whatever incongruity there may be in continuing payments to a person on the presumption that she is dependent on a deceased husband, when in fact she is receiving ample support from a new husband, is a matter for the Legislature and not for the courts to remove."

Our answer to the first of the questions certified to us is that the obligation of the respondent, Rhode Island Company, to pay compensation to the pettioner, did not cease by reason of her second marriage.

The papers in the case, with this decision certified thereon, will be sent back to the superior court.

SUPREME COURT OF UTAH.

GARFIELD SMELTING CO.

v.

INDUSTRIAL COMMISSION OF UTAH. (No. 3277.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —VALIDITY OF ACT.

Industrial Commission Act, § 72, providing for election between compensation for death under the act or damages in law action, and under section 73 for waiver of right to bring law action by application for compensation, is not violative of Const. art. 16, § 5, as abrogating right of an adult to recover damages for death under Comp. Laws 1888, §§ 3178, 3179; an adult being capable of making election.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —WAIVER OF LAW—ACTION FOR DEATH—MINORS.

An heir who is not sui juris cannot waive his right of action for death by an application for an award, or vice versa, under Industrial Commission Act, § 73, being incapable in law of making an election.

(For other cases, see Master and Servant, Dec. Dig. § 357.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —VALIDITY OF ACT—MINORS.

Industrial Commissions Act, in so far as it attempts to limit compensation to minor heirs for death and enforce a waiver of right to bring law action for the death under section 73, is invalid where death was by employer's

* Decision rendered, Dec. 27, 1918. 178 Pac. Rep. 57.

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wrongful act, minors having right of action in such case under Comp. Laws 1888, §§ 3178, 3179, which cannot be abrogated under Const. art. 16, § 5, but is valid where death was not caused by employer's negligence or wrongful act.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

9. MASTER AND SERVANT—WORKMEN'S COMPENSATION—WAIVER OF LAW ACTION—MINORS—WAIVER BY MOTHER.

Mother by applying for compensation for father's death does not, under Industrial Commissions Act. § 73, waive minor children's right to bring law action for damages under Comp. Laws 1888, §§ 3178, 3179, where death was caused by employer's wrongful act, which right Industrial Commissions Act could not abrogate under Const. art. 16, § 5.

(For other cases, see Master and Servant, Dec. Dig. § 357.)

10. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—HEARSAY.

Under Industrial Commission Act, § 88, Industrial Commission may consider hearsay evidence, but no material finding can stand, if seasonably assailed, where based entirely on hearsay or incompetent evidence.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

Appeal from District Court, Salt Lake County; R. B. Porter, Judge.

Action by the Garfield Smelting Company against the Industrial Commission of the State of Utah. Judgment of dismissal, and plaintiff appeals. Affirmed.

Bagley & Ashton, of Salt Lake City, for appellant.

Dan B. Shields, Atty. Gen., and O. C. Dalby and Herbert Van Dam, Jr., Asst. Attys. Gen., for respondent.

FRICK, C. J. The questions presented by this appeal are based upon and arise out of the provision of chapter 100, Laws Utah 1917, commonly known as the Industrial Commission Act, hereinafter designated as the Industrial Act. That act has been before us on two other occasions, namely, in Industrial Commission v. Daly Mining Co., 172 Pac. 301, and in Industrial Commission v. Evans, 174 Pac. 825, where a number of sections of that act were construed and applied. To avoid unnecessary repetition we refer to those cases, and shall in this opinion set forth only such portions of the Industrial Act as are absolutely necessary to make clear the questions decided.

The questions now to be determined, briefly stated, arise as follows: On the 24th day of September, 1917, one Mary G. Ringholz, of Salt Lake City, filed her petition and application before the Industrial Commission wherein she, in substance, alleged that she is the surviving widow of one Jacob Ringholz, who on August 22, 1917, had died from an injury which was caused by an accident arising in the course of his employment while he was an employee of the Garfield Smelting Company, the appellant here. The particulars concerning the accident resulting in death were set forth in the petition. The petitioner also gave the names and ages of the surviving children of the decedent, who were three sons, one of whom was 11, another 16, and the third 18 years of age. The petition contained all the necessary allegations which are required by the rules of the Industrial Commission. The Garfield Smelting Company, hereinafter designated appellant, appeared and answered the petition. In its answer it was admitted that the petitioner was the widow, and that the children were the sons of the deceased, that the deceased, prior to his death, was an employee of appellant, and that he died on the date stated in the petition.

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Appellant, however, denied that the death of the deceased "was caused by reason of an accident arising out of or in the course of his employment by the defendant," and further denied all other material allegations of the petition. Appellant also affimatively averred in its answer that the commission was without jurisdiction, setting forth the facts in that regard in detail. A hearing was had before the Industrial Commission on the issues presented by the petition and answer, and on the 22d day of October, 1917, it filed its decision, in which it, in substance, found that the deceased was injured as alleged; "that the injury was one arising out of and in the course of the employment of the deceased by the defendant corporation." Other necessary findings were made which it is not necessary to repeat here. The commission accordingly awarded the widow the sum of $4,500, to be paid by the appellant "for the benefit of herself and minor child," the son of 11 years of age. The other two sons, for the reason hereinafter appearing, were excluded. The award was made payable at the rate of $15 a week, "payable every four weeks until the total sum of $4,500 is paid or until the further order of this commission." Appellant was also required to pay $200 "for medical, hospital, and nursing expenses," and $150 for "funeral expenses." Upon a rehearing the last two items were eliminated from the award, and the award in all other respects was affirmed. After the rehearing and the affirmance of the award the appellant commenced this action in the district court of Salt Lake county against the commission pursuant to the provisions of the Industrial Act. It set forth in its complaint all of the facts hereinbefore stated, with others not necessary to be enumerated, and also stated the facts in detail why the commission was without jurisdiction and wherein it had exceeded its powers under the Industrial Act, and alleged that the award, for specific reasons stated, was unconstitutional and void. When the matter came on for hearing in the district court, appellant demanded a jury trial upon the issue as to whether the deceased was injured in the course of his employment, and hence whether the appellant was liable under the Industrial Act. The district court refused a jury trial, and, after hearing arguments of counsel upon the other questions raised upon the issues presented, and upon the law, the court entered a judgment dismissing the action, from which judgment this appeal is prosecuted.

Counsel for appellant have assigned a large number of errors. In their brief they have, however, limited their argument to the following propositions: (1) "That the Industrial Commission Act, in so far as it attempts in death cases to abrogate the right of action by the heirs, or any of them, or attempts to fix a statutory limitation of the amount recoverable, is unconstitutional and void;" (2) whether the widow, acting alone, without regard to the rights of the children, may exercise the sole right to waive an action for damages and accept the compensation provided by the act; (3) that the employer is entitled to a jury trial upon the question whether the alleged injury is one "arising out of and in the course of employment," and that the district court erred in denying appellant a jury trial upon that question; and (4) that, even though appellant is not entitled to a jury trial, yet the award of the commission is void, and the judgment of the district court affirming the same is erroneous because there is no evidence whatever in support of the finding that the injury which caused the death of the deceased arose out of and in the course of his employment. We have condensed counsel's second and third propositions into our third.

We remark that at the hearing in this court both counsel for the appellant and the Attorney General, who appeared for the commission, with most commendable frankness, conceded that there are a number of difficult questions which arise under the Industrial Act by reason of some of the provisions of our Constitution which do not arise under similar act in other jurisdictions. It was conceded, therefore, that in

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so far as those constitutional provisions are concerned, the decisions of the courts of other jurisdictions, where such provisions are not in force, can shed but little, if any, light upon what the result should be respecting some of the propositions involved on this appeal.

We shall consider the several propositions relied on by appellant's counsel in the order we have stated them.

The constitutional provision which is specifically relied on by appellant is found in article 16, § 5, of our Constitution, which reads as follows:

"The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

[1] A mere glance at the foregoing section shows that it imposes a double limitation upon legislative action: (1) That the right to "recover damages for injuries resulting in death" may not be abrogated; and (2) that the amount of recovery in such actions may not be limited by law. In view that state Constitutions are limitations on the legislative power respecting the subjects expressed in the limitations, the Legislature ordinarily may nevertheless enlarge existing rights; that is, such rights, if otherwise proper subjects of legislation, while they may not be destroyed or abridged, may nevertheless be enlarged or augmented by legislative enactment. In view, therefore, that the Constitution clearly prohibits the Legislature from abrogating the "right of action," it becomes necessary to inquire what that right was and who enjoyed it at the time the Constitution was adopted by the people of this state. As we have seen, the Constitution says "the right of action" shall not be abrogated; hence the right referred to must be deemed to be the right as it then existed and not merely an abstract right. The right as it then existed is found in 2 Comp. Laws Utah 1888 and constituted sections 3178 and 3179 of that compilation. Those sections read as follows:

"3178. A father, or in case of his death or desertion of his family, the mother may maintain an action for the death or injury of a minor and a guardian for the injury or death caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

"3179. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

Those two sections are also found under the title "Of the Parties to Civil Actions" in Laws Utah 1884, c. 54, as sections 233 and 234. From there they were carried into Comp. Laws 1888, supra, and from the latter into R. S. Utah 1898 as sections 2911 and 2912. Those sections were amended to make them more specific in some particulars in 1901 (see Laws Utah 1901, p. 40), and they thereafter became a part of Comp. Laws 1907 as sections 2911 and 2912. We shall refer to the numbers of the sections as found in Comp. Laws 1907, but shall limit the argument to the sections as they existed in 1895, when the Constitution was adopted.

The right of action given in section 2911 in case of the death of a minor child at the time the Constitution was adopted was vested in the father, and, in case of his desertion, in the mother, and in the case of the death of the ward, in the guardian. The right of action was, however, limited to cases where the death was caused by the "wrongful act or neglect of another." Where, however, the wrongful act or neglect in question was that of a person for whose acts and neglect another was

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responsible, the right of action existed against either or both. By section 2912, in case of the death of a person not a minor which was caused by the wrongful act or neglect of another, the right of action was vested in the heirs or personal representatives of the deceased persons. In view of the language of the constitutional provision, we are bound to presume that the "right of action" there mentioned is the right which was conferred in the statute which we have quoted. In the absence of anything to the contrary in the Constitution itself, the presumption becomes conclusive. The election of remedy which is provided for in section 72 of the Industrial Act was no doubt intended to conform that act to the constitutional provision to which we have referred. It no doubt was also for that reason that section 73 of said act was adopted. That section reads:

"Every employee or his legal representatives in case death results, who makes application for an award, or accepts compensation from an employer, waives his right to exercise his option to institute proceedings in any court. Every employee, or his legal representative in case death results, who exercises his option to institute proceedings in court, as provided in this act, waives his right to any award, or direct payment of compensation from his employer."

[2-4] If all those who are given a right of action in case of death are adults and of sound mind, no difficulty can arise, since such persons are capable to choose and elect; and so long as an opportunity to choose and a reasonable time of election is given to exercise the right we cannot see how the right given by the Constitution can be said to be abrogated. The question then merely is one of limiting the time within which the right shall be exercised, which is necessarily a legislative question, provided the time is not unreasonably short. As we have seen, the statute, however, gives the right of action to the heirs, regardless of whether they are minors or adults. Indeed, the right, as all know, is, and in the nature of things must necessarily be, more frequently exercised by minors than by adults. True, not all heirs may be dependents, and thus be entitled to substantial damages, but all heirs have a right of action, and are thus entitled to at least nominal damages as a matter of law. It is the right of action we are now dealing with, and not the question of damages. The question therefore is: Is the waiver provided for in the Industrial Act to which we have referred binding on an heir who is not sui juries? We think not. Such an heir under the law is incapable of making an election, and hence his acts, whatever they may be, cannot be held to constitute an election and a waiver which binds him. As we have pointed out, however, in making the award in this case the commission limited the amount to $4,500, and made a further order that the same be paid for the benefit of the widow and the youngest son, thus excluding the two older ones, one of whom was 16 and the other 18 years of age, from sharing in the award to any extent. In making the foregoing award for the amount stated, and in excluding the two older sons, the commission followed the provisions of the Industrial Act. Counsel for appellant, however, contend that in limiting the amount in cases of death and in excluding any heirs the provisions of that act are contrary to the provisions of the Constitution which we have quoted. Counsel therefore insist that the award of the commission and the exclusion of the two sons are of no force or effect. Indeed, they insist that the award is not binding even on the youngest son, since it follows the limitation imposed in the act. They contend, therefore, that even though the award were paid, their client would nevertheless still be subject to an action by the three sons, since neither of them has attained his majority, and hence could not and did not waive any of the rights guaranteed by the constitutional provision. If, therefore, in case of the death of the father, a right of action accrues, and such right is vested in all of the heirs, or for the benefit of all, and the amount of damages

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may not be limited by law, but must be determined either by a court or by a jury in an ordinary action and in accordance with the usual procedure in law cases, it is not easy to perceive why counsel's contention in an ordinary case of negligence should not prevail. We are of the opinion, therefore, that in so far as the act attempts to limit the amount of damages, or compensation as it is there called, in case of death which arises in the course of the employment of the deceased, and which is caused by the wrongful act or neglect of the employer, or of some one for whose acts he is responsible, and in so far as the act attempts to enforce a waiver against minors, and in limiting the amount of recovery as against them, it is invalid, and not enforceable against such minors. It does not follow, however, that the provisions of the act are not enforceable in any case of death which is caused by an injury arising in the course of the employment. Of course, there is no liability in any case unless the injury causing the death arises in the course of the employment of the deceased. But the right of compensation in such a case is not limited by the Industrial Act, as in our statute, to cases where the death is the result of some wrongful act or neglect. As we have seen, sections 2911 and 2912 give the right of action only in case the death is caused by the wrongful act or neglect of another. No cause of action arises, therefore, if the death is caused by a mere accident or where the negligence of the deceased is the proximate cause or proximately contributes thereto, or in case any of the other usual defenses that are available are established. Moreover, in case an action is brought to recover damages pursuant to sections 2911 or 2912, the defenses of assumed risk, contributory negligence, and fellow servants are still available, while, if an application for compensation under the Industrial Act is made, these defenses are not available. Under the Industrial Act, therefore, the accident causing death need not be caused through the wrongful act or neglect of the employer or through the wrongful act or neglect of one for whom he is responsible. All that is necessary to entitle the claimant under the act compensation is that the death resulted from an injury which arose in the course of the employment of the deceased, and his mere acts of negligence do no constitute a bar to the action. The action is barred only in case that it is shown that the death was caused through the willful or criminal act of the deceased, or what is equivalent thereto. The remedy given by the Industrial Act is therefore broader than the one given by the statute, and it is the statutory remedy only that is guaranteed by the Constitution. The Legislature thus has enlarged the right to compensation, and in so far as that was done the Legislature has the right to determine and to direct who shall enjoy the fruits of the increased or enlarged remedy. If, therefore, the award in this case is one which is based entirely upon the enlarged remedy given by the Industrial Act, we can conceive of no reason why it is not binding upon all persons if it conforms to the provisions of the act. If such is the case, no rights guaranteed by the Constitution are abridged or invaded, and no limitation is imposed contrary to the Constitution, since the award in question is entirely outside and beyond the right which is protected by the Constitution. In this connection it must, however, not be overlooked that an award may be made in a case where the death of the husbannd and father was in fact caused by the wrongful act or neglect of the employer or of some one for whom he is responsible, but the application may ignore that fact and the claim may be based upon the act alone. If such is the case, the minor heirs are not bound, whatever the award may be, since the Constitution protects their rights in such a case. Under such circumstances the right exists by virtue of the statute which existed when the Constitution was adopted, and hence cannot be ignored by merely following the provisions of the Industrial Act. The question therefore arises in every case of death where there are minor heirs: Was the death caused by the wrongful act or neglect of the employer or one for whom he is responsible,

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or was it merely accidental without any wrong or neglect whatever? If the latter is the case, then, as we have seen, no complication arises, since the claim is not one which is affected or protected by the Constitution, and hence no rights are invaded in complying with the provisions of the Industrial Act, although some of the heirs may be excluded from participation as provided in the act. So far as they are concerned, the award is a mere gratuity to the widow and the children under the age of 16.

We remark that under the Industrial Act no child who is actually dependent, whatever its age, is excluded; but, in case the child has attained the age limit the fact of dependency must be made to appear, since under the act all children above a certain age are deemed not to be dependents. That phase of the act, however, needs no further discussion here.

[5] From what has been said it follows that in every case where claim for compensation is for the death of an employee, against an employer, which is caused by an injury which arose in the course of the employment, and where there are heirs who are minors, the question of whether the death was caused through the wrongful act or neglect of the employer, or of some one for whose acts and neglect he is responsible, the cause of death must be legally and judicially determined. If it be determined that the death was caused by wrongful act or neglect, the constitutional provision at once becomes effective, and the rights of the minor heirs are protected. It is clear that the right of the minor heirs cannot be determined by the mother's application for compensation under the Industrial Act. Neither can she, by making such an application, waive the rights of the minors; nor will she be deemed to have waived their rights until and unless such waiver is made in a judicial proceeding and in a manner known to the law affecting minors' rights. In such case, therefore, the commission cannot legally make an award which is binding on the minor heirs unless they have waived their constitutional rights in conformity with law, and the commission should not proceed to make an award in such cases until the rights of the minor heirs have been judicially determined, as hereinbefore stated, and their waiver has been obtained in a proper judicial proceeding. Unless and until that has been done no employer can safely pay an award made by the commission until the general statute of limitations in such cases has fully run. If, however, heirs may waive their rights by not bringing an action, they may also do that otherwise; but, as suggested, it must be legally done, and not by mere implication. The defendant may, however, well waive that question in this proceeding, since the evidence is clear and, as it seems to us, indisputable that the death in this case was not caused by either the wrongful act or neglect of the defendant, or of any one for whose acts it is responsible. We cannot see how either the defendant, the heirs, or anyone else can successfully contend otherwise. As before stated, the evidence that the death was entirely accidental is not only not disputed, but, under the circumstances, it seems to us, that fact is indisputable, and hence no question of fact arises. In view of that the award in this case is based entirely upon the enlarged remedy created by the Industrial Act, and hence, as we have seen, the constitutional rights of the heirs are not involved or affected. No waiver on their part is therefore essential. By what we have just stated we do not mean to be understood that the defendant can be required to waive that question as a matter of law, nor that we require it to do so, but what we mean is that under the evidence in this case but one result seems permissible, and that is that the death was purely accidental, and hence the defendant might well waive any further judicial inquiry with respect to that question.

[6] From what has been said it follows that the Industrial Act, in so far as it provides compensation in cases where the death is caused by the wrongful act or neglect of another, and where it assumes to limit the damages in such cases and attempts to impose a waiver on the part of minor heirs otherwise than in the manner herein outlined, cannot be up-

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held. This, however, does not affect the other provisions of the act, nor does it affect the provisions of the act in cases where the death is purely accidental, as hereinbefore stated.

This brings us to the second proposition, namely, whether the widow may waive the rights of the minor heirs. From what has already been said it necessarily follows that she may not do that. The right is a constitutional right, and if the widow may waive it, as was attempted in this case, and as the Industrial Act seems to contemplate, then the right of action, so far as the minor heirs are concerned, is practically abrogated. Moreover, if she may do that, she may also waive the other constitutional provision that the amount of damages shall not be limited. In all cases, therefore, of death by wrongful act or neglect, the waiver of the minor heirs must be obtained in some judicial proceeding in the manner hereinbefore indicated. This disposes of the second proposition.

The third proposition, namely, that the district court erred in denying defendant a jury trial upon the question of whether the accident causing the death was one arising out of and in the course of the employment of the deceased is not so difficult. It is only fair to the district judge who tried the case to state that at the time he tried this case the case of Industrial Commission of Utah v. Evans, reported in 174 Pac. 825, had not been decided. In that case we held that, in view that in section 87 of the Industrial Act the employee is given the right of trial by jury in case the commission denies his claim for compensation upon the ground "that the accident did not arise out of and in the course of the employment," we could not escape from the conclusion that the employer, in case he denied that the accident thus arose, was also entitled to a jury trial. That conclusion was based upon the fact that the employer, whether a self-insurer or one who contributed to the insurance fund, is directly interested in preventing spurious claims from being allowed, and hence is entitled to defend against any claims upon the ground that the injury upon which the claim is based is not one which was caused by an accident arising out of and in the course of the employment.

[7-9] If there is one fundamental principle which is calculated to perpetuate our form of government, both federal and state, more than any other it is that every citizen, regardless of his station or condition, is entitled to the equal protection of the law whether it applies to his personal or to his property rights. Every law which offends against that principle in the federal Constitution is necessarily invalid. When, therefore, the language of an act or section which is drawn in question may be given a dual meaning, that is, where it is open to different constructions, it is the duty of the courts to adopt that construction. For the purpose of conforming to the foregoing rule of construction we felt constrained to construe section 87 of the Industrial Act in the Evans Case so as to give the employer the same rights and protection that in that section are expressly given to the employee. We therefore held in that case, inasmuch as the employee is entitled to a jury trial in case his claim is denied upon the ground that the accident causing the injury "did not arise out of and in the course of employment," the employer must be given the same right; otherwise he would be denied the equal protection of the law. That such would be the case is clearly illustrated in the case of Atchison & S. F. Ry. v. Vosburg, 238 U. S. 56, 35 Sup. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E, 953. While it is true that in the Evans Case we held that the question of the ultimate liability of the employer or the ultimate right of recovery of the employee, under our Constitution constitutes a judicial question which, if insisted upon by either or both parties, must be determined by the courts, yet we did not there hold, nor even intimate, nor do we now hold, that the question must be determined in any particular form of action. All that we there held was that, where a particular form of action or trial is given to one of the parties, the same right must be accorded to the other. It may well be that the Industrial Act could have been so framed

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as to give the parties a right of review in the courts, or in some court, in a different form of action or proceeding than by a jury trial, just as is the case in California, Michigan, New York, and other jurisdictions where similar acts are in force. See Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, Englebretson v. Industrial Commission, 170 Cal. 793, 151 Pac. 421, Reck v. Whttlesberger, 181 Mich. 463,148 N. W. 247, Ann. Cas. 1916C, 771, and Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435-439, 113 N. E. 507, Ann. Cas. 1918B, 540, reversing 169 App. Div. 450, 155 N. Y. Supp. 1. The foregoing cases illustrate how the ultimate question of liability or right of recovery may be reviewed by the courts in proceedings other than by jury trials. See, also, Courter v. Simpson Construction Co., 264 Ill. 497, 106 N. E. 353, and other cases referred to in the Evans Case. So long, however, as our Industrial Act reads as it now does, there is no escape from the conclusion that the defendant is entitled to a jury trial upon the question of whether the injury is the result of an accident which arose out of and in the course of the employment of the defendant.

This brings us to the final proposition, namely, that there is no competent evidence authorizing a finding that the injury resulted from an accident which arose out of and in the course of the employment.

The Industrial Commission at the hearing admitted the statements of the deceased in which he explained when, where, and how he received the injury.

It is vigorously insisted by counsel for appellant that hearsay evidence is inadmissible for any purpose.

Section 88 of the Industrial Act reads as follows:

"The commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

A similar section is in force in the state of New York, and it was there contended, as it is here, that hearsay evidence was inadmissible. The Supreme Court of New York, in the Matter of Carroll v. Knickerbocker Ice Co., 169 App. Div. 450, 155 N. Y. Supp. 1, held that under the section of the Industrial Act referred to above the commission could make an award on hearsay evidence alone, or on other evidence which would be incompetent under the ordinary rules of evidence. That ruling was, however, reversed by the New York Court of Appeals, which is the court of last resort, in 218 N. Y. 435—439, 113 N. E. 507, Ann. Cas. 1918B, 540.

In the case of Englebretson v. Industrial Commission, 170 Cal. 793, 151 Pac. 421, it is also held that under the California statute, which, however, is narrower than the New York statute and section 88 of our statute, hearsay evidence is not admissible for any purpose.

[10] While we have the highest regard for the opinion of the California Supreme Court, yet, in view that the difference between our section 88 and the California statute is a substantial one, and for other reasons which we shall not pause to state, we cannot assent to the conclusion of that court as broadly as it is stated, namely, that the Commission may not admit hearsay evidence for any purpose. We are of the opinion that for the purpose of determining questions of fact arising under the Industrial Act the commission, in order to arrive at the truth, may pursue any course or method which to it seems best calculated to arrive at the truth, so long as it does not depart from the provisions of the act. The commission may thus have recourse to hearsay evidence if such evidence may lead to some tangible fact which sheds light upon the ultimate question to be determined and found. In that respect it is the duty of the commission to observe and follow the provisions of the act, and if that is done neither this nor any other court has the right to interfere with the commission in

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the method pursued by it in arriving at its conclusions. We, however, agree with the New York Court of Appeals, as expressed in 218 N. Y. 439, 113 N. E. 507, Ann. Cas. 1918B, 540, that although the commission in its investigations may have recourse to hearsay evidence to assist it at arriving at the real facts, yet when it makes its findings every finding of fact must be based on some substantial legal and competent evidence. In other words, every material finding that is entirely based on hearsay or other incompetent evidence is not supported by substantial evidence, and cannot be permitted to stand if seasonably and properly assailed. This, it seems to us, is the only reasonable and practical construction that should be placed on the Industrial Act when considered as a whole, as it must be.

Defendant's counsel are in error in their contention that the finding that the deceased died from an injury which was caused by an "accident arising out of and in the course of his employment" is based entirely upon hearsay evidence. At least one witness testified that he was with the deceased when he received the injury which ultimatly caused his death. True the witness said he did not remember which finger, or whether it was on the right or the left hand that the deceased was injured. That, in view of the other evidence, is of no great moment. There is no evidence whatever, or even any fact from which a legitimate inference could be deduced that the deceased was injured elsewhere or otherwise than as stated by the witness just referred to. Indeed, there is some evidence to the effect that the deceased was not otherwise injured. As the evidence now stands, therefore, the only legitimate inference is that the deceased was injured precisely as stated by the witness, and in view of all the other evidence the inference is again more than merely persuasive that the injury actually resulted in death. The finding that is assailed is therefore clearly and sufficiently supported by substantial and competent evidence. As hereinbefore stated, however, the defendant is entitled to a jury trial upon that issue if it so elects, but, in view that the questions respecting the competency and sufficiency of the evidence to support the findings were squarely presented for decision, we had no alternative, and hence were compelled to determine them.

We desire to add in conclusion that we have gone into the questions more fully than we otherwise would have done in deference to counsel's desire that we determine the effect of the several provisions of the Industrial Act, in so far as that could legitimately be done in this proceeding.

For the reasons stated, the judgment is reversed, and, in case the defendant still desires a jury trial upon the question whether the accident which resulted in the death of the deceased did or did not arise out of and in the course of employment of the deceased, the case is remanded to the district court of Salt Lake county, with directions to try that question as herein provided. If, however, the defendant elects to abide by this opinion and does not desire to try the question referred to farther, the judgment of the district court will stand affirmed, without costs.

Corfman, Thurman, and Gideon JJ., concur.

McCarty, J., died after the submission of the cause and before the filing of this opinion.

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SUPREME COURT OF WASHINGTON.

METON

v.

STATE INDUSTRIAL INSURANCE DEPARTMENT. (No. 14946.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"WIDOW."

The word "widow," since it is not defined by Workmen's Compensation Act, is to be given its ordinary meaning, which is "a married woman whose husband is dead."

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Widow.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"WIDOW."

Although claimant and deceased had lived together for about six years under the belief that they were lawfully married, where there was no compliance with statute further than to make out two of the three affidavits for a license required by Rem. Code 1915, § 7164, claimant was not the "widow" of deceased, within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—"DEPENDENT."

Claimant, who had lived with deceased for about six years under the erroneous belief that she was lawfully married to him, is not a "dependent," within Workmen's Compensation Act, § 6604—3.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceeding for compensation by Mary Meton, as the widow of Nick Meton, deceased. From decision of superior court, affirming decision of State Industrial Insurance Department, rejecting and disallowing claim made against accident fund created under Workmen's Compensation Act, claimant appeals. Affirmed.

George H. Rummens and Jay C. Allen, both of Seattle, for appellant.

W. V. Tanner, of Olympia, and D. E. Twitchell, of Spokane, for respondent.

PARKER J. This is an appeal by the claimant, Mary Meton, under section 6604—20, Rem. Code, from the decision of the superior court for King county, affirming the decision of the State Industrial Insurance Department, rejecting and disallowing her claim made against the accident fund created under our Workmen's Compensation Act. Her claim is made as the widow of Nick Meton, deceased, who, it is conceded, was killed while engaged in an extrahazardous employment, under such circum-

* Decision rendered, Jan. 6, 1919. 177 Pac. Rep. 696.

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stances as to entitle his widow, if he left one, to compensation from that fund. The only questions here presented are: Is appellant the widow of Nick Meton; and, if not, is she a dependent of him, within the meaning of the Workmen's Compensation Act?

[1] There is no definition of the word "widow" to be found in the act, though there is of the word "dependent," apart from the word "widow." It is therefore plain that the word "widow," as used in the act, must be given its ordinary meaning, which is, "a married woman whose husband is dead." 3 Bouvier's Law Dictionary (Rawle's 3d Rev.) 3454.

[2] It is conceded that appellant has not married since the death of Nick Meton; so our first inquiry is: "Was appellant his lawful wife at the time of his death? On September 21, 1911, appellant, then a widow, and Nick Meton, went to the courthouse in Pacific county to get a license to be married, and we may assume with the intention of then and there being married. They are Polish people, and neither of them could then speak or understand the English language. There went with them to the auditor's office the eight year old daughter of appellant, who acted as interpreter as best she could in the conversation there had between them and the deputy auditor. The deputy filled out the forms of affidavits required by section 7164, Rem. Code, to be made by each of the parties applying for marriage license, which appellant and Nick Meton then signed and swore to before the deputy, who thereupon so certified, attaching the official seal of the office to his certificate. There being no disinterested person present of sufficient age who could make the third affidavit, as required by section 7164, Rem. Code, as a prerequisite to the issuing of a marriage license, the deputy gave to them a form for such affidavit, informing them, as best he could, through appellant's daughter as interpreter, of the necessity of having such affidavit made by a third person, and instructing them to have the same made by some such person and return the same to the auditor's office, when he would issue the marriage license. He then gave to them the papers, including the affidavits already made by them, and so certified by him, expecting they would all be returned properly executed within a few days, when he would issue the license.

At that time Nick Meton paid the fees for the issuing of the license. They then left the auditor's office, and susequent events clearly indicate that they did not understand the import of what occurred there, apparently because of the inability of the eight year old daughter of appellant to make plain to them what was there said by the deputy auditor. They left the auditor's office, believing they were married, and continued in that belief, we assume in good faith, up until the time of the death of Nick Meton, which occurred in March 1917. During the whole of this period they lived together, and openly held themselves out to the world as husband and wife. During this period appellant preserved the paper, upon which there was partly written and partly printed the affidavits made by herself and Nick Meton for a marriage license, given to them by the deputy auditor, believing that paper was evidence of their marriage, though she never read it, not being able to do so, and apparently not considering that there was any necessity for having it read or translated to her. While appellant's sworn statement, made in her application to the Industrial Insurance Department for compensation from the accident fund because of the death of Nick Meton, which statement we assume was made in good faith, showed that she was the widow of Nick Meton, the department, not being satisfied with her showing in that behalf, required of her that she produce a marriage certificate, or some other written evidence of her marriage to Nick Meton. In compliance therewith she produced the paper upon which the affidavits of herself and Nick Meton appeared, which had been given to her by the deputy auditor when they applied for a marriage license, and which she had preserved in the belief that that paper

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was evidence of her marriage to Nick Meton. It is plain from the evidence that no marriage license was ever issued, that no ceremony of any nature was ever performed, and that no marriage certificate was ever issued by any one purporting to evidence their marriage.

[3] If a marriage agreement could be lawfully made, and the marriage status created in this state as at common law, it is quite probable that appellant and Nick Meton should be held to be husband and wife at the time of his death. It has, however, become the settled law of this state that the marriage status cannot be legally so created; it being necessary to comply with our statute law in order to lawfully create such status. In re McLaughlin's Estate, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; In re Smith's Estate, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573; Kelley v. Kitsap County, 5 Wash. 521, 32 Pac. 554; In re Wilbur's Estate, 14 Wash. 242, 44 Pac. 262. The facts here shown render it too plain to admit of argument to the contrary that appellant and Nick Meton did not comply with our marriage statutes in any particular looking to their marriage, other than to make two of the three affidavits required as a prerequisite to the procuring of a marriage license, and the payment of the marriage license fee.

Appellant relies upon our decisions in McDonald v. White, 46 Wash. 334, 89 Pac. 891, in re Sloan's Estate, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960, Thomas v. Thomas, 53 Wash. 297, 101 Pac. 865, and In re Brenchley's Estate, 96 Wash. 223, 164 Pac. 913, L. R. A. 1917E, 968. In the McDonald Case there was an actual marriage ceremony performed by a duly ordained minister, and thereafter the parties lived together for many years, holding themselves out to the world as husband and wife. In the course of the opinion it is said:

"The evidence does not affirmatively show that such a license (meaning marriage license) was issued, nor does it affirmatively show that it was not issued."

This seems to be the principal attack made upon the validity of the marriage. It was there held, in substance, that the presumption arising from cohabitation for a period of years, and the fact that there was a marriage ceremony, was sufficient proof of a lawful marriage. It is true that in the case before us the cohabitation for a number of years under the belief of lawful marriage would, standing alone, raise a strong presumption of marriage. But the trouble in this case is that the evidence goes too far, and shows affirmatively that there never was a lawful marriage. The Sloan decision is relied upon because of its recognition of the rule, as therein quoted, that—

"The presumption of marriage, from cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law."

This is no greater aid to appellant than the McDonald decision. The Thomas decision aids appellant to no greater extent. The Brenchley decision is well summarized in the syllabus as follows:

"Where a woman entered into a marriage in good faith without knowledge that the marriage was void because the husband had been divorced within less than six months previously, and they lived together in good faith as man and wife and accumulated property by their joint efforts, the probate court has jurisdiction, on the death of the husband, to award one-half of the property to her, as a just and equitable distribution of their joint accumulations."

Our decision in Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900, rests upon the same view of the law as announced in the Brenchley decision, though that was a disposition of property in an annulment of marriage action, which property would have been community property had the marriage been legal. Each of these decisions, while recognizing the marriage as void, disposed of the woman's property rights on broad principles of equity and estoppel invoked against the man, in the one case, and against those claiming under him as heirs, in

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the other. This is not a case of disposition of property which appellant held in common with Nick Meton. The argument of counsel touching this branch of the case rests upon the good faith of appellant in her cohabitation with Nick Meton, in the belief that she was married to him, and the presumption arising therefrom. But, as already noticed, the evidence in this case proves too much, since it goes to the extent of conclusively showing that there never was any issuance of a license authorizing such marriage, or solemnization of such marriage, or the issuance of a certificate by any one purporting to evidence such marriage. That the presumption arising from such cohabitation in good faith is rebuttable was recognized in Weatherall v. Weatherall, 56 Wash. 344, 350, 105 Pac. 822.

[4] Some contention is made in appellant's behalf that she is in any event a dependent of Nick Meton, within the meaning of the Workmen's Compensation Act. The fallacy of this contention is shown by the definition of the word "dependent," found in the act itself, as follows:

" 'Dependent' means any of the following named relatives of a workman whose death results from an injury and who leaves surviving no widow, widower, or child under the age of sixteen years, viz.: Invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent in whole or in part, for their support upon the earnings of the workman." Section 6604—3, Rem. Code.

Plainly appellant's relation to Nick Meton does not bring her within any of the classes of persons so defined as "dependents." So her claimed right to compensation from the accident fund must be disposed of by the answer to the question: Was she the legal wife of Nick Meton at the time of his death? We see no escape from the conclusion that this unfortunate appellant cannot be awarded compensation from the accident fund as prayed for by her.

The judgment is affirmed.

Main, C. J., and Mount, Holcomb, and Fullerton, JJ., concur.

SUPREME COURT OF WASHINGTON.

PUGET SOUND BRIDGE & DREDGING CO.

v.

INDUSTRIAL INS. COMMISSION ET AL. (No. 14994.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ADMIRALTY JURISDICTION.

Workmen's Compensation Act, which withdraws from private controversy all remedy for injuries received in hazardous work, and excludes every other remedy, does not extend to employees on a vessel in navigable waters, and the Industrial Insurance Commission cannot collect from an employer premiums on account of such employees, notwithstanding Act Cong. Oct. 6, 1917 (U. S. Comp. St. 1918, §§ 991 [3], 1233) amending Judicial Code, §§ 24, 256, saving to suitors in admiralty any common-law remedy, and rights and remedies under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

* Decision rendered, Jan. 10, 1919. 177 Pac. Rep. 788.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ADMIRALTY JURISDICTION.

The employees of a corporation engaged in dredging upon navigable waters, who are employed solely on land, fall within the Workmen's Compensation Act, and premiums therefor should be paid by the employer to the Insurance Commission.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ADMIRALTY JURISDICTION.

Where a corporation engaged in dredging had employees who were engaged partly on land and partly on dredges subject to admiralty jurisdiction, *held* that the Industrial Insurance Commission was entitled to collect premiums to be paid in proportion to the time the employees spent on land and on the navigable water.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Department 1.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by the Puget Sound Bridge & Dredging Company against the Industrial Insurance Commission and others. From the judgment, defendants appeal. Affirmed.

W. V. Tanner, of Olympia, and Jno. A. Homer, of Seattle, for appellants.

Roberts, Wilson & Skell, of Seattle, for respondent.

MACKINTOSH, J. The plaintiff is engaged in the work of dredging upon the navigable waters within the state of Washington. It carries on this work by means of hydraulic dredges, taking material from the beds of the navigable waters, and, after conveying it through pipes, discharging it upon adjacent lands. In this work it employes three classes of employees: First, those who work continuously upon the dredge, and whose employment is entirely upon that vessel; second, those who work wholly upon the land, and are at no time called to go upon the vessel; and, third, those who work partly upon the vessel and partly upon the land, and during the day's work go back and forth from one to the other, and who, in passing from the dredge to the land and from the land to the dredge, sometimes use rowboats and at other times walk upon the pontoon pipes connecting the dredges with the land.

The Industrial Insurance Commission, the defendant in this action, claims that all employees of the plaintiff are subject to the Workmen's Compensation Act (Laws 1911, p. 345), and that premiums should be paid on account of the work of all the employees engaged in dredging operations.

[1] As to those employees who work exclusively upon the dredge, we are firmly of the opinion that the plaintiff should pay no premiums; for the dredge, as a vessel, is subject to admiralty jurisdiction and if premiums were paid for employees engaged exclusively thereon, the company in the event of an injury occurring to one of such employees would receive no protection under the act. State ex rel. Jarvis v. Daggett, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A, 446; Shaughnessy v. Northland Steamship Co., 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1918B, 655; Southern Pacific v. Jensen, 244 U. S. 205 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. The fact that Congress, on October 6, 1917 (Act Oct. 6, 1917, c. 97, §§ 1, 2, 40 Stat. 395 [U. S. Comp. St. 1918, §§ 991 (3), 1233]) amended (by adding the italicized portion) sections 24 and 256 of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 Stat. 1091, 1160), relating to the jurisdiction of federal

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District Courts in admiralty, and providing that federal courts should have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, *and to claimants the rights and remedies under the Workmen's Compensation Law of any state,*" does not change the rule of these cases and extend to the Industrial Insurance Commission jurisdiction of persons engaged in maritime work, for the reason that the Workmen's Compensation Act of this state withdraws all "remedy of workmen against employers for injuries received in hazardous work" "from private controversy," and excludes "every other remedy," and therefore the Federal Act cannot create a liability where one already exists in admiralty.

[2] The second class of workmen, employed solely upon the land, comes within the operation of provisions of this act, and for them premiums are collectible.

[3] As to the third class, we are confronted by the perplexing question of this case. The Workmen's Compensation Act was passed with the avowed purpose of providing the exclusive manner of compensating employees engaged in hazardous work and occupations, and within the scope of the act all employees of a company such as the plaintiff are to he brought within the operation of that act, so far as it is within the power of the Legislature to do so. The Legislature, not bringing within the act those employees who are within the jurisdiction of admiralty, cannot compel the employer to pay premiums for those employees for whose injuries the employer would be liable in admiralty. On the other hand, the employer is not absolved from the duty of paying premiums for those employees who are not within the admiralty jurisdiction, and for whose injury the employer would have been liable in a suit at common law before the passage of the Workmen's Compensation Act. It may be, as here, that it would be an onerous task to so segregate, for the purpose of computing the premium to be paid the time of employees who are alternately on land and on the navigable water, but this is a matter of detail of the business which must be worked out by the employer and the commission, and is not one which calls for judicial action. If this segregation is impracticable, the remedy must lie in some alteration of the act by the Legislature.

As to those employees falling within the third class, the Industrial Insurance Commission is entitled to a collection of premiums for such time as those employees are engaged in work upon the land, and is not entitled to receive premiums representing the time that they are without the protection of the act and subject to the rules of admiralty jurisdiction.

The decision in the recent case of Spokane & Inland Empire R. R. Co. v. Industrial Insurance Commission, 176 Pac. 34, in no wise conflicts with the views here expressed, for we there held that the Workmen's Compensation Act as it relates to railroad companies a part of whose business is interstate, exempted such company from the operation of the act, and the question as to whether the employees were sometimes engaged in interstate and at others in intrastate commerce was not material, for the reason that the status of the railroad company, as being one partially engaged in interstate commerce, determined the question of the liability of the company for premiums under the state Workmen's Compensation Act, for its employees.

The judgment of the lower court will be affirmed.

Main, C. J., and Tolman and Mitchell, JJ., concur.

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SUPREME COURT OF APPEALS OF WEST VIRGINIA.

POCCARDI, ROYAL CONSUL OF ITALY,

v.

OTT, STATE COMPENSATION COM'R.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—PARTICIPATION IN FUND—APPLICATION.

To entitle an applicant to participate in the Workmen's Compensation Fund he must have filed his application with the compensation commissioner within six months after the date of death or injury of the person on whose account the claim is made, as required by section 39 of the Workmen's Compensation Act (Code Supp. 1918, § 695.)

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPLICATION FOR RELIEF—DATE OF FILING.

Neither the date of the mailing or posting of such application nor the date when by due course it should have reached the compensation commissioner can be treated as the date of the filing of such application in order to bring it within the provision of the statute, although such delay may have been due to the existence of a state of war not between the United States and the country in which such application was posted, the statute not in terms suspending the operation of the statute of limitations in such cases.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from order of State Compensation Commissioner.

Proceeding by Gaetano Poccardi, Royal Consul, of Italy, etc., against Lee Ott, State Compensation Commissioner, to vacate an order, refusing to consider a claim of the alleged dependents of Pietro Garufi, deceased, or to allow compensation to them, and to require the commissioner to award them compensation. Order of commissioner affirmed, and petition denied.

Jos. W. Henderson, of Philadelphia, Pa., for appellant.
E. T. England, Atty. Gen., and Frank Lively, Asst. Gen., for appellee

MILLER, P. Petitioner on behalf of the alleged dependents of Pietro Garufi, deceased, seeks by this proceeding to vacate the order of the State Compensation Commissioner, made on May 13, 1918, refusing to file or consider their claim and to allow compensation to said dependents, being the widow and daughter of said decedent, and to require said commissioner to receive, award and allow them compensation pursuant to the statute creating the Workmen's Compensation Fund.

[1] The sole ground for the commissioner's action as shown by his opinion and report was that the claim for such compensation was not made in due form or in any form within six months from and after the death of the decedent as required by section 39 of the Workmen's Compensation Act (Code Supp. 1918, § 695), citing and relying upon the construction and application of said section in the recent case of Culurides v. Ott, Commissioner, 78 W. Va. 696, 90 S. E. 270.

*Decision rendered, Jan. 14, 1919. 98 S. E. Rep. 69. Syllabus by the Court.

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In the case cited there had been a bona fide though defective application for compensation within the limitation prescribed by the statute. We decided that by giving the statute the liberal construction required by the provisions thereof, the defective application supplemented as it was by other proceedings, constituted a valid application for such compensation, warranting payment. But, we said in that case, what the statute plainly prescribes, that where no attempt is made to prepare and file an application within the required six months, the claim cannot be allowed, holding the statute in this respect to be imperative.

The only answer made to this proposition and the order of the commissioner is: First, that as the formal application, mailed at Fiumedinisi, Messina, November 6, 1917, was delayed in transmission on account of the existence of a state of war, not between the United States of America and the Kingdom of Italy, but between them and the Central Powers of Europa, did not reach and was not filed with the commissioner until December 13, 1917, the application should be considered made as of the date of posting or at least as of the date when according to the usual time required for transmission, about twelve days, the same should have been received and filed with the commissioner. Second, that to deprive the applicants of compensation under the facts assumed in the first proposition is opposed to all theories of constitutional and private international law suspending the operation of the statute of limitations during the existence of war delaying or preventing intercommunication between citizens of the belligerent powers.

On the first proposition it is sufficient to answer that the statute makes no exception in favor of delayed applications; it is imperative. To entitle the applicant to participate in the compensation fund, he must substantially comply with the statute. Luckie v. Merry, 9 N. C. C. A. 895, note 906, and cases cited. The English act of 1906, section 2, as shown in the Luckie Case, suspends the operation of the statute of limitations under certain circumstances such as mistake, absence and other causes. But our statute contains no such provision, and such provision cannot be interpolated under the most liberal rules of construction. Lewis' Sutherland Statutory Construction, section 367. The record shows that petitioner was promptly notified of the death of decedent a very few days after it occurred, and if anything could excuse the delay, it has not been sufficiently shown so as to justify any exception to the limitation of the statute.

[2] On the other proposition, involving the existence of a state of war. it is sufficient to answer that the rule or principle invoked is not applicable except as between citizens of opposing belligerent states, and when the courts of the one are closed to the citizens of the other. As the Kingdom of Italy and the Government of the United States of America were not at war between themselves, but were united against a common enemy, the rules of international law so appeared to have no application. Besides, no sufficient excuse is offered by any proof why the application could not have been made on time. Wood on Limitations, section 6; Buswell on Limitations, section 129.

For the foregoing reasons we must affirm the order of the commissioner and deny the petitioner the relief prayed for.

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SUPREME COURT OF WISCONSIN.

HOLT LUMBER CO ET AL.

v.

INDUSTRIAL COMMISSION OF WISCONSIN ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The provisions of the Workmen's Compensation Act should be liberally construed.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES ARISING OUT OF OR IN THE COURSE OF EMPLOYMENT—"INCIDENTAL TO EMPLOYMENT."

Where a workman, employed in a logging camp, was required to sleep in a bunk furnished by the employer, and was there injured by a straw falling from an upper bunk lodging in his throat, the injury grew out of and was incidental to his employment within the meaning of St. 1917, § 2394— 3, subd. 2.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

3. MASTER AND SERVANT—THE RELATION—HOURS AND PLACES OF EMPLOYMENT.

The relation of master and servant may extend beyond the hours the servant is actually required to labor, and in some instances to places other than the premises where the servant is employed.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—SLEEPING ON PREMISES.

Where a contract of employment provided that the servant should sleep on the premises and in the bunk furnished by the master, it was within the course of his employment for the servant to remain upon the premises at night and use the bunk furnished for him.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceeding by Sam Bebeau, employee, for compensation for personal injuries, opposed by the Holt Lumber Company, employer, and the Wisconsin Employers' Exchange, insurer. From a judgment of the circuit court, setting aside an award of the Industrial Commissioner, the Commission and the applicant appeal. Judgment reversed, and cause remanded, with instructions to affirm the award.

Appeal from a judgment of the circuit court for Dane county, setting aside an order of the Industrial Commission awarding to appellant, Sam Bebeau, $259.03 as compensation and expenses.

Appellant, Sam Bebeau, was in the employ of the Holt Lumber Company as a sawyer at one of its camps. On the evening of March 13, 1917, while in his bunk talking to a fellow employee who was in an ad-

* Decision rendered, Jan. 7, 1919. 170 N. W. Rep. 366.

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joining bunk, a straw fell from the bunk above, lodged in his throat, causing infection, which resulted in disability, for which compensation was awarded.

The lower court set aside the award on the ground that the evidence was not sufficient to support the finding to the effect that at the time of the accident appellant was performing services growing out of and incidental to his employment.

Spencer Haven, Atty. Gen. Winfield W. Gilman, Asst. Atty. Gen., and Miller & Miller, of Martinette, for appellants.

Otjen & Otjen, of Milwaukee, for respondents.

KERWIN, J. (after stating the facts as above. The Industrial Commission, as a basis for awarding damages to appellant. Sam Bebeau, found, among other things, that:

"During the winter of 1917 the applicant was in the respondent's employ in the woods as a sawyer; he was paid $40 per month and board, and lived in a camp furnished by the respondent. This camp was located several miles from any other dwelling, and all of the men employed by the respondent at this particular logging operation boarded at the respondent's camp. The men in the camp slept in bunks arranged so that one man slept above the other.

"On the evening of March 13th, after his supper, the applicant retired to his bunk, and, while talking to a fellow workman in the bunk next to him, a piece of straw dropped from the bunk above his and lodged in his throat. He made an effort to remove the straw, called the attention of the man in the adjoining bunk to his condition, but was unable to dislodge the straw.* * *

"* * * The facts in the case show that the employees of the respondent in this particular camp were in the employ of the respondent from the time they entered the camp until they left. They could not select their own sleeping quarters, but were compelled to sleep where the respondent instructed them to sleep. The evidence shows that in order to sleep outside the camp a man would be required to travel eight miles. We think that, where the employer places the workman in such circumstances that his time is never his own, where he has no discretion as to where he shall sleep and where he shall eat, that the workman must be considered in the employ of the respondent all of the time or at least performing a service which is incidental to the employment he is engaged in. We think that the facts in this case show that this man was accidentally injured while in the respondent's employ, and that he is entitled to the benefits of the Compensation Act."

The findings of the commission are supported by the evidence.

It is established by the evidence that Bebeau was in the continuous employ of the Holt Lumber Company during the logging season and under its care and protection as well during the night when off duty as during the day. It furnished the bunks where he and other men slept. The bedding furnished was very old and in poor condition, the straw sticking through the ticks. There were two men in the bunk above that in which Bebeau slept. The men were expected to perform some service after supper, such as grinding axes.

The only question involved is whether the court below erred in holding that the appellant, Bebeau, was not, at the time of the accident performing services growing out of the and incidental to his employment within the meaning of subdivision 2 of section 2394—3, St.

[1] This court has held in harmony with the decisions of other courts that the provisions of the Compensation Act (St. 1917, §§ 2394—1 to 2394—95) should be liberally construed. Sadowski v. Thomas F. Co.,

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157 Wis. 443, 146 N. W. 770; Kiel v. Industrial Commission, 163 Wis. 441, 158 N. W. 68; Federal R. Co. v. Havolic et al., 162 Wis. 341, 156 N. W. 143, L. R A. 1916D, 968; In re Ayres (Ind. App.) 118 N. E. 386.

[2] The court below held that Bebeau was not performing services growing out of and incidental to his employment, and based its ruling upon the following cases in this court; Hackley-Phelps-Bonnell Co. v. Industrial Commission, 165 Wis. 586, 162 N. W. 921, L. R. A. 1918A, 277; Brienen v. Wisconsin P. S. Co., 166 Wis. 24, 163 N. W. 182; Federal R. Co. v. Havolic et al., 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968. These cases are all distinguishable from the case at bar. In the Hackley-Phelps-Bonnell Case the man had fully completed his work and left the employment. In the Brienen Case the injured person was performing a private service for himself, which had no connection with the business of his employer. Federal R. Co. v. Havolic et al., supra, as distinguished in Newport Hydro Carbon Co. v. Industrial Commission, 167 Wis. 630, 167 N. W. 749, is not authority against the appellant here.

In the instant case, at the time of the injury, Bebeau was in the employ of the lumber company, under its protection and using the things which it furnished to him for his use during the employment and as incident to such employment. Under such circumstances he was performing services growing out of and incidental to his employment within the meaning of subdivision 2 of section 2394—3, Stats. Ewald v. Chicago & N. W. Ry. Co., 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178.

[3] This court has held that the relation of master and servant extends beyond the hours the servant is actually required to labor, and in some instances to places other than the premises where the servant is employed. Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327; Northwestern I. Co. v. Industrial Commission, 160 Wis. 633, 152 N. W. 416.

[4] It has also been held by this court that one eating lunch upon the premises of his employer in accordance with custom is performing services growing out of and incidental to his employment. Racine R. Co. v. Industrial Commission, 165 Wis. 600, 162 N. W. 664; Milwaukee W. F. Co. v. Industrial Commission, 159 Wis 635, 150 N. W. 908.

The same ruling has been made in other jurisdictions. Rowland v. Wright, 1 B. W. C. C. 192; Heldmaier v. Cobbs, 96 Ill. App. 315; Taylor v. George W. Bush & Sons Co., 5 Pennewill (Del.) 378, 61 Atl. 236.

In the instant case it was part of the contract of employment that Bebeau should sleep on the premises in the bunk furnished by the lumber company. It was in the course of his employment to remain upon the premises nights and use the bunk furnished for him. Under such circumstances he was within the course of his employment. Foley v. Home R. Co., 89 N. J. Law, 474, 99 Atl. 624; Richards v. Indianapolis A. Co. et al., 92 Conn. 274, 102 Atl. 604; Hackley-Phelps-Bonnell Co. v. Industrial Commission, 165 Wis. 586, 162 N. W. 921, L. R. A. 1918A, 277; Kilduff v. Boston E. Co., 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873.

The general rule under the authorities is that when the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the employee under such cirdcumstances is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer. Rucker v. Read, 39 N. J. Law J. 48; Chitty v. Nelson, 2 B. W. C. C. 496; Alderidge v. Merry, 6 B. W. C. C. 450; Griffith v. Cole Bros. et al. (Iowa) 165 N. W. 577; Meyers v. Michigan Cent. R. Co. (Mich.) 165 N. W. 703; Cokolon v. Ship Kentra, 5 B. W. C. C. 658; International & G. N. R. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219.

A great many cases in point are cited in the able brief of the Attorney General, but we shall not prolong this opinion by further citation of authority It is sufficient to sav that the great weight of authority sup-

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ports the position of the Attorney General, to the effect that at the time of the accident Bebeau was performing services growing out of and incidental to his employment within the meaning of the Workmen's Compensation Act; therefore the judgment of the court below must be reversed.

The judgment of the court below is reversed, and the cause remanded, with instructions to affirm the award of the Industrial Commission, with costs.

Owen, J., took no part.

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UNITED STATES SUPREME COURT.

MIDDLETON

v.

TEXAS POWER & LIGHT CO. (No. 102.)*

1. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—PERSONS ENTITLED TO OBJECT.

One not an employee in an excepted class in the Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) may not assert any grievance that excepted class might have to the validity of the act.

(For other cases, see Constitutional Law, Dec. Dig. § 42.)

2. CONSTITUTIONAL LAW—MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EQUAL PROTECTION OF LAWS.

The Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) does not deny the equal protection of the laws, in that it excludes from operation of the act domestic servants, farm laborers, employees of railroad carriers, laborers working cotton gin, and employees of persons, etc., employing no more than five; there being sufficient reasons as to each class for their exclusion.

(For other cases, see Constitutional Law, Dec. Dig. § 245; Master and Servant, Dec. Dig. § 347.)

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

Action by Charlie Middleton against the Texas Power & Light Company. From a judgment of the Court of Civil Appeals of Texas (188 S. W. 276), affirming on rehearing, after answer to certified questions (108 Tex. 96, 185 S. W. 556), a judgment dismissing the action, which judgment had been previously reversed (178 S. W. 956), plaintiff brings error. Affirmed.

Mr. Charles B. Braun, of Waco, Tex., for plaintiff in error.

Messrs. Harry P. Lawther and Alexander Pope, both of Dallas, Tex., for defendant in error.

Mr. Justice PITNEY delivered the opinion of the Court.

Alleging that in the month of December, 1913, he was in the employ of the Texas Power & Light Company in the state of Texas, and while so employed received serious personal injuries through the bursting of a steam pipe due to the negligence of his employer and its agents, Middleton sued the company in a district court of that state to recover his damages. The defendant interposed an answer in the nature of a plea in abatement setting up that at the time of the accident and at the commencement of the action defendant was the holder of a policy of liability and compensation insurance, issued in its favor by a company lawfully transacting such business in the state, conditioned to pay the compensation provided by the Texas Workmen's Compensation Act, which was approved April 16, 1913, and took effect on the 1st day of September in that year (chapter

* Submitted Dec. 18, 1918. Decided March 3, 1919. 39 S. C. Rep. 227.

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179, Acts of 33d Legislature, [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) of which fact the plaintiff had proper and timely notice as provided by the act; and that no claim for the compensation provided in the act with respect to the alleged injury had been made by plaintiff, but on the contrary he had refused to receive such compensation, with other matters sufficient to bring defendant within the protection of the act. Plaintiff took a special exception in the nature of a demurrer, upon the ground (among others) that the act was in conflict with the Fourteenth Amendment to the Constitution of the United States. The exception was overruled, the plea in abatement sustained, and the action dismissed. On appeal to the Court of Civil Appeals it was at first held that the judgment must be reversed (178 S. W. 956); but upon an application for a rehearing the constitutional questions were certified to the Supreme Court of the state. That court sustained the constitutionality of the law (108 Tex. 96, 185 S. W. 556); and in obedience to its opinion the Court of Civil Appeals set aside its former judgment and affirmed the judgment of the district court. Thereupon the present writ of error was sued out under section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

Thus we have presented, from the standpoint of an objecting employee, the question whether the Texas Employers' Liability Act is in conflict with the due process and equal protection provisions of the Fourteenth Amendment.

The act creates an employers' insurance association, to which any employer of labor in the state, with exceptions to be mentioned, may become a subscriber; and out of the funds of this association, derived from premiums on policies of liability insurance issued by it to subscribing members and assessments authorized against them if necessary, the compensation provided by the act as due on account of personal injuries sustained by their employees, or on account of death resulting from such injuries, is to be paid. This is to be paid. This is a stated compensation, fixed with relation to the employee's average weekly wages, and accrues to him absolutely when he suffers a personal injury in the course of his employment incapacitating him from earning wages for as long a period as one week, or to his representatives or beneficiaries in the event of his death from such injury, whether or not it be due to the negligence of the employer or his servants or agents. Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employee, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employee of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the willful act or omission or gross negligence of the employer. Employers who do not become subscribers are subject as before to suits for damages based on negligence for injuries to employees or for death resulting therefrom, and are deprived of the so-called "common-law defenses" of fellow servant's negligence and assumed risk, and also of contributory negligence as an absolute defense, it being provided that for contributory negligence damages shall be diminished except where the employer's violation of a statute enacted for the safety employees contributes to the injury or death; but that where the injury is caused by the willful intention of the employee to bring it about the employer may defend on that ground. Every employer becoming a subscriber to the insurance association is required to give written or printed notice to all his employees that he has provided for the payment by the association of compensation for injuries received by them in the course of their employment. Under certain conditions an employer holding a liability policy issued by an insurance company lawfully transacting such business within the state is to be deemed

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a subscriber within the meaning of the act. There are administrative provisions, including procedure for the determination of disputed claims. By section 2 of part 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246hh) it is enacted as follows:

"The provisions of this act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employees of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employees of any person, firm or corporation having in his or their employ not more than five employees."

Following the order adopted in the argument of plaintiff in error, we deal first with the contention that the act amounts to a denial of the equal protection of the laws. This is based in part upon the classification resulting from the provisions of the section just quoted, it being said that employees of the excepted classes are left entitled to certain privileges which by the act are denied to employees of the non-excepted classes, without reasonable basis for the distinction.

[1] Of course plaintiff in error, not being an employee in any of the excepted classes, would not be heard to assert any grievance they might have by reason of being excluded from the operation of the act. Southern Ry. Co. v. King, 217 U. S. 524, 534, 30 Sup. Ct. 594, 54 L. Ed. 868; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 32 Sup. Ct. 784, 56 L. Ed. 1197; Rosenthal v. New York, 226 U. S. 260, 271, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 34 Sup. Ct. 359, 58 L. Ed. 713; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364. But plaintiff in error sets up a grievance as a member of a class to which the act is made to apply.

[2] However, we are clear that the classification cannot be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Tex. 110, 111. 185 S. W. 561):

"Employees of railroads, those employers having less than five employees, domestic servants, farm laborers and gin laborers are excluded from the operation of the act, but this was doubtless for reasons that the Legislature deemed sufficient. The nature of these several employments the existence of other laws governing liability for injuries to railroad employees, known experience as to the hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the Legislature in exempting them from the operation of the act. Distinctions in these and other respects between them and employees engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary."

[3, 4] There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. Rosenthal v. New York, 226 U. S. 260, 271, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71; Patsone v. Pennsylvania, 232 U. S. 138, 144, 34 Sup. Ct. 281, 58 L. Ed. 539; Missouri, Kan. & Texas Ry. v. Cade, 233 U. S. 642, 649, 650, 34 Sup. Ct. 678, 58 L. Ed. 1135; International Harvester Co. v. Missouri, 234 U. S. 199, 215, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; Keokee Coke Co. v. Taylor, 234 U. S. 224, 227, 34 Sup. Ct. 856, 58 L. Ed. 1288; Miller v. Wilson, 236 U. S. 373, 384. 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829.

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[5] The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. But in this case adequate grounds are easily discerned. As to the exclusion of railroad employees, the existence of the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665), as amended by act April 5, 1910, c. 143, 36 Stat. 291, applying exclusively as to employees of common carriers by rail injured while employed in interstate commerce, establishing liability for negligence and exempting from liability in the absence of negligence in all cases within its reach (New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662), and the difficulty that so often arises in determining in particular instances whether the employee was employed in interstate commerce at the time of the injury (see Pedersen v. Del., Lac. & West. R. R., 229. U. S. 146, 151, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 259, 260, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Illinois Central R. R. v. Behrens, 233 U. S. 473, 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; New York Central R. R. Co. v. Carr, 238 U. S. 260, 263, 35 Sup. Ct. 780, 59 L. Ed. 1298; Pennsylvania Co. v. Donat, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139; Shanks v. Del., Lack. & West. R. R., 239 U. S. 556, 559, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Louisville & Nash. R. R. Co. v. Parker, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; Erie R. R. Co. v. Welsh, 242 U. S. 303, 306, 37 Sup. Ct. 116, 61 L. Ed. 319; Southern Ry. Co. v. Puckett, 244 U. S. 571, 573, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69), reasonably may have led the Legislature to the view that it would be unwise to attempt to apply the new system to railroad employees, in whatever kind of commerce employed, and that they might better be left to common-law actions with statutory modifications already in force (Vernon's Sayles' Texas Civ. Stat. 1914, arts. 6640-6652), and such others as experience might show to be called for.

The exclusion of farm laborers and domestic servants from the compulsory scheme of the New York Workmen's Compensation Act was sustained in New York Central R. R. Co. v. White, 243 U. S. 188, 208, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, upon the ground that the Legislature reasonably might consider that the risks inherent in those occupations were exceptionally patent, simple, and familiar The same result has been reached by the state courts generally. Opinion of Justices, 209 Mass. 607, 610, 96 N. E. 308; Young v. Duncan, 218 Mass. 346, 349, 106 N. E. 1; Hunter v. Colfax Coal Co., 175 Iowa. 245, 287, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803; Sayles v. Foley, 38 R. I. 484, 490-492, 96 Atl. 340. Similar reasoning may be applied to cotton gin laborers in Texas; indeed, it was applied to them by the Supreme Court of that state, as we have seen. And the exclusion of domestic servants, farm laborers, casual employees, and railroad employees engaged in interstate commerce was sustained in Mathison v. Minneapolis Street Ry. Co., 126 Minn. 286, 293, 148 N. W. 71, L. R. A. 1916D, 412.

The exclusion of employees where not more than four or five are under a single employer is common in legislation of this character, and evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together; the Legislature, of course, being the proper judges to determine precisely where the line should be drawn. Classification on this basis was upheld in Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576-577, 35 Sup. Ct. 167, 59 L. Ed. 364, and has been sustained repeatedly by the state courts. State v. Creamer, 85 Ohio St.

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349, 404, 405, 97 N. E. 602, 39 L. R. A. (N. S.) 694; Borgnis v. Falk Co., 147 Wis. 327, 355, 133 N. W. 209, 37 L. R. A. (N S.) 489; Shade v. Cement Co, 93 Kan. 257, 259, 144 Pac. 249; Sayles v. Foley, 38 R. I. 484, 491, 493, 96 Atl. 340.

[6] The discrimination that results from the operation of the act as between the employees of different employers engaged in the same kind of work, where one employer becomes a subscriber and another does not, furnishes no ground of constitutional attack upon the theory that there is a denial of the equal protection of the laws. That the acceptance of such a system may be made optional is too plain for question; and it necessarily follows that differences arising from the fact that all of those to whom the option is open do not accept it must be regarded as the natural and inevitable result of a free choice, and not as a legislative discrimination. They stand upon the same fundamental basis as other differences in the conditions of employment arising from the variant exercise by employers and employees of their right to agree upon the terms of employment. And see Borgnis v. Falk Co., 147 Wis. 327, 354, 133 N. W. 209, 37 L. R. A. (N. S.) 489; Mathison v. Minneapolis Street Ry. Co., 126 Minn. 286, 294, 148 N. W. 71, L. R. A. 1916D, 412.

In recent years many of the states have passed elective workmen's compensation laws not differing essentially from the one here in question, and they have been sustained by well-considered opinions of the state courts of last resort against attacks based upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer. Sexton v. Newark District Telg. Co., 84 N. J. Law, 85, 86 Atl. 451; Id., 86 N. J. Law, 701, 91 Atl. 1070; Opinion of Justices, 209 Mass. 607, 96 N. E. 308; Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Borgnis v. Falk Co., 147 Wis. 327; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; Diebeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211. Ann. Cas. 1915A, 241; Crooks v. Tazewell Coal Co., 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304; Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; Mathison v. Minneapolis Street Ry. Co., 126 Minn. 286. 148 N. W. 71, L. R. A. 1916D, 412; Shade v. Cement Co., 93 Kan. 257, 144 Pac. 249; Sayles v. Foley, 38 R. I. 484, 96 Atl. 340; Greene v. Caldwell, 170 Ky. 571, 186 S. W. 648, Ann. Cas. 1918B, 604; Hunter v. Colfax Coal Co., 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803. The Ohio law was sustained by this court against special attacks in Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364, and the Iowa law in Hawkins v. Bleakly, 243 U. S. 210. 213, et seq., 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637.

[7] Stress is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employee of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employees taking them out of the operation of the act; but probably such an agreement might be held by the courts of the state to be inconsistent with the general policy of the act. The Supreme Court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act.

But a moment's reflection will show the impossibility of giving an option both to the employer and to the employee and enabling them to exercise it in diverse ways. The provisions of the act show that the

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legislative purpose is that it shall take effect only upon acceptance by both employer and employee. The former accepts by becoming a subscriber; the latter by remaining in the service of the employer after notice of such acceptance. And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employee. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employee, who may go from place to place seeking satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success. the Legislature deemed it proper, if not essential, that the payment of compensation to the injured employees or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employees of a given employer should be treated alike. Still further there are reasons affecting the contentment of the employees and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the state in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employee who with notice of the employer's acceptance dissented from the resulting arrangement should be required to exercise his option by withdrawing from the employment. The relation of employer and employee being a voluntary relation, it was well within the power of the state to permit employers to accept or reject the new plan of compensation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employees of the equal protection of the laws within the meaning of the Fourteenth Amendment.

This disposes of all contentions made under the equal protection clause.

[8, 9] It is argued further that there is a deprivation of liberty and property without due process of law in requiring employees, willingly or unwillingly, to accept the new system where their employer has adopted it. Of course there is no suggestion of a deprivation of vested property in the present case, since the law was passed in April and took effect in September, while the plaintiff's injuries were received in the following December, after he had been notified of his employer's acceptance of the act. What plaintiff has lost, therefore, is only a part of his liberty to make such contract as he pleased with a particular employer and to pursue his employment under the rules of law that previously had obtained fixing responsibility upon the employer for any personal injuries the plaintiff might sustain through the negligence of the employer or his agents. But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of respondeat superior, the imposition of liability without fault, and the exemption from liability in spite of fault—all these, as rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irre-

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spective of the question of fault, and requiring the employee to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employees as well as employers N. Y. Central R. R. Co. v. White, 243 U. S. 188, 198-206, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Timber Co. v. Washington, 243 U. S. 219, 234, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642.

All objections to the act on constitutional grounds being found untenable, the judgment under review is

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

DELAWARE, L. & W. R. CO.

v.

PECK. (No. 16.)*

1. COMMERCE—INJURY IN "INTERSTATE COMMERCE."

Employee, in a local switching crew at station in New Jersey, injured while setting brake on open coal car being switched between sidings, car having come from Pennsylvania consigned to company in New Jersey, *held* not engaged in "interstate commerce." to bring his case within federal Employers' Liability Act (Comp. St. § 8618.)

(For other cases, see Commerce, Dec. Dic. Dig. § 27[7].)

In Error to the District Court of the United States for the Southern District of New York.

Action by Richard G. Peck against the Delaware, Lackawanna & Western Railroad Company. To review judgment for plaintiff, defendent brings error. Reversed.

A. J. McMahon and William S. Jenney, both of New York City (Douglas Swift, of New York City, of counsel), for plaintiff in error.

Edwin J. McCrossin and Vine H. Smith, both of New York City, for defendant in error.

Before Ward, Rogers, and Hough, Circuit Judges.

WARD, C. J. This is a writ of error to a judgment upon the verdict of a jury in favor of the plaintiff for damages and costs in the sum of $25,057.31, for loss of left hand and of left leg below the knee, sustained by him while in the defendant's employment. The action is brought under the federal Employers' Liability Act (Comp. St. §§ 8657-8665). At the time he sustained the injuries in question the plaintiff was one of the local switching crew at Delawanna Station, N. J., and was setting the brake on an open coal car which was being switched from a siding back of the station known as the "Old Switch" to another siding on the other side of the main tracks known as the "Hart Siding." The

* Decision rendered, December 11, 1918. 255 Fed. Rep. 261.

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plaintiff alleged that the brake and brake step of the coal car were defective, which made the defendant absolutely liable under the federal Safety Appliance Act (Comp. St. § 8605 et seq.), and also liable under the federal Employers' Liability Act because of the negligence of the engineer in giving the car a violent lurch. We will assume that the plaintiff has established all his charges of negligence.

[1] The first question to be considered is whether the plaintiff was at the time in question engaged in interstate commerce. The car came from Knoxdale, Pa., consigned to the Thomas A. Hart Company at Delawanna. That company was building a highway crossing for the defendant under a contract which required the defendant to transport and deliver to the company all materials to be used in the work, free of freight charges; the company to pay all demurrage charges in accordance with the defendant's rules.

Saturday morning, September 16, 1916, at 5 a. m., the car arrived at Delawanna and was put on a siding known as the "Old Switch." Between 9:30 and 10 a. m. the superintendent of the Hart Company directed the car to be placed at the stub end of that switch, which was done.

On Monday, September 18, the superintendent directed the car to be moved to Hart's Siding and the accident happened while this was being done. These movements were within the yard limits of Delawanna. The Hart Company receipted for the coal September 16 and paid demurrage in accordance with the defendant's rules of one dollar a day after the expiration of 48 hours from 7 a. m. of that date until the car was unloaded. Upon the undisputed facts we think the plaintiff was not engaged in interstate commerce, that the interstate journey had ended at least when the car was placed by the direction of the Hart Company at the stub end of the old switch, and that the judge should have so held as matter of law. All switching thereafter in the yard for the convenience of the consignee was intrastate commerce. This is in accordance with our understanding of the decision of the Supreme Court in Lehigh Valley Railroad Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070, reversing the decision of the Court of Appeals of the state of New York; Mr. Justice McReynolds saying:

"Basing his claim upon the federal Employers' Liability Act, defendant in error sought damages for personal injuries. The New York Court of Appeals affirmed a judgment in his favor (214 N. Y. 116 [107 N. E. 814]), and the question now presented is whether there is evidence tending to show that he was injured while engaging in interstate commerce. The accident occurred July 27, 1912, when, as member of a switching crew, he was assisting in placing three cars containing supply coal for plaintiff in error on an unloading trestle within its yards at Cortland, N. Y. These cars belonged to it and with their contents had passed over its line from Sayre, Pa. After being received in the Cortland yards—one July 3 and two July 10—they remained there upon sidings and switches until removed to the trestle on the 27th.

"We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce. The essential facts in Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177 [36 Sup. Ct. 517, 60 L. Ed. 941], did not materially differ from those now presented. There we sustained a recovery by an employee, holding he was not engaged in in interstate commerce; and that decision is in conflict with the conclusion of the Court of Appeals. The judgment under review must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion."

The plaintiff relies greatly on Penna. v. Donat, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139, which was decided on motion to dismiss or

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affirm, on authority of New York Central & Hudson River R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298. The report is very brief, but an examination of the record in the Circuit Court of Appeals discloses that the plaintiff, a yard conductor in charge of a switching crew, was directed to take two interstate cars from a train and place them upon Olds' private switch track connecting with the yard. To do this it was necessary to remove from that switch two empty cars which had been used in interstate commerce. While the plaintiff was arranging for this at 11 o'clock at night, he fell into an unguarded and unlighted hole, and the court left it to the jury to say whether he was, under all the circumstances, engaged at the time in interstate commerce. This was on the principle, stated by Mr. Justice Lamar in the Carr Case, that railroad employees frequently pass on the same day from intra to inter state commerce and vice versa under circumstances under which it is difficult to draw the line. We do not think this applies to the present case.

[2, 3] But it is contended that, even if the plaintiff were engaged in intrastate commerce, the defendant is absolutely liable under the federal Safety Appliance Act, without regard to any question of negligence, because the car was not equipped with an efficient hand brake and proper brake step. This act laid down requirements as to railroad equipment with which all carriers engaged in interstate commerce must comply under the penalty of $100 for each and every violation. Of course, one of the class intended to be protected by the act injured by the failure of a carrier to comply with it is entitled to recover damages (Texas & Pacific Railway Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874), but not under the federal Employers' Liability Act, unless he were at the time engaged in interstate commerce, which this plaintiff was not.

The plaintiff's employment and injury both took place in the state of New Jersey. His theory is that for injuries resulting from a violation of this act he may recover damages in a common-law action brought wherever he can serve the defendant. But master and servant together constitute a relation or status, which involves many mutual rights and duties not expressed in the specific contract of employment. That contract fixes, among other things, the kind, place, and time of employment, and the compensation. The definition and extent of the relation itself are fixed by the law of the state where it was established, but Congress has written into it, in the case of railroad companies and their employees, this additional feature on which the plaintiff relies. The state of New Jersey has defined the rights and duties of the relation of master and servant by the Workmen's Compensation Act (chapter 95, Laws 1911, as amended by chapter 174, Laws 1913), which we regard as excluding all other jurisdictions. Section II regulates elective compensation without regard to the negligence of the employer, and subsection 9 provides that every contract of hiring shall be presumed to have been made with reference to section II unless there be an express statement in writing as a part of the contract or by either party to the other prior to any accident that it is not intended to apply. So also either party may terminate the application of section II by giving 60 days' notice in writing to the other before any accident.

The answer sets up this act as a defense, and alleges that there was no provision in the contract that section II should not apply, and that the plaintiff had given no such notice to the defendant before the accident; wherefore he could not maintain the action. At the trial the defendant offered to prove these allegations, but the court refused to permit it, and the defendant excepted. We think this was error. The New Jersey act creates a system to be enforced by the court of common pleas of the county of New Jersey which would have jurisdiction in a civil case. The employee is required to give notice of the injury to the employer within a fixed time. The compensation to be paid for the loss of a leg or of

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a hand is a fixed proportion of the employee's daily wages for a fixed number of weeks, and this compensation may be commuted by the court of common pleas into one or more lump sums. That court is also to settle, at the request of either of the parties, any dispute about compensation. For these reasons we are of the opinion that the plaintiff cannot maintain this action in the District Court for the Southern District of New York. There are some decisions of the courts of New York to a similar effect. Albanese v. Stewart, 78 Misc. Rep. 581, 138 N. Y. Supp. 942; Lehmann v. Ramo Films, Inc., 92 Misc. Rep. 418, 155 N. Y. Supp. 1032; McCarthy v. McAllister Steamboat Co., 94 Misc. Rep. 692, 158 N. Y. Supp. 563; Verdicchio v. McNab, 178 App. Div. 48, 164 N. Y. Supp. 290.

The judgment is reversed.

UNITED STATES DISTRICT COURT.

E. D. NEW YORK.

NEUMANN

v.

MORSE DRY DOCK & REPAIR CO., INC.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —ACCEPTANCE OF COMPENSATION—EFFECT.

Though a stevedore presented a claim and accepted compensation under the state compensation law, *held* that, as the state Compensation Commission was without jurisdiction, the acceptance of compensation is not a bar to a libel in admiralty; the payments, if made by the employer, being deductible from the recovery, and, if made by the state, to be treated as gratuities.

(For other cases, see Master and Servant, Dec. Dig. §§ 351, 385[17].)

In Admiralty. Libel by Carl F. Neumann against the Morse Dry Dock & Repair Company, Incorporated. On exceptions to answer. Exceptions sustained.

Nathaniel Phillips, of New York City (William Godnick and Louis R. Bick, both of Brooklyn, N. Y., of counsel), for libelant.

Henry C. Hunter, of New York City, for respondent.

CHATFIELD, District Judge. This action is in admiralty for personal injuries to a stevedore, who presented a claim and accepted compensation under the New York Compensation Law (Consol. Laws, c. 67) prior to the decision of the United States Supreme Court in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. After the decision in that case he began the present action.

The respondent interposed as one defense that the libelant made the application above stated and accepted compensation in full satisfaction of his claim. The libelant now moves to strike out this defense, upon the proposition that the moneys received under the Compensation Law were

* Decision rendered, December 18, 1918. 255 Fed. Rep. 97.

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gratuities, or extrajurisdictional payments. This is opposed by the respondent on the authority of The Fred E. Sander (D. C.) 212 Fed. 545. On this theory it is urged that, although no common-law right of recovery exists, although the injured party must proceed in admiralty, and although the Employers' Liability or Workmen's Compensation Act of the various states gives no additional cause of action or right because of the exclusive admiralty jurisdiction under the United States Constitution (Southern Pac. Co. v. Jensen, supra), nevertheless the injured person may, by acts showing an election or voluntary contract to accept compensation under the state law, estop himself, and thereby waive his rights in admiralty. It should be noted that the Sander Case was earlier than the Jensen Case, and that it presents an apparently anomalous situation on the present state of the law.

Thus a contract which could not be enforced, because the law creating it is unconstitutional, and as to which the courts have no jurisdiction, would, without conscious agreement on the part of the injured party, be left as the only protection of that injured party in collecting any future compensation, and valid as a defense to the employer.

It seems more difficult to sustain the authority of the state Compensation Commission in a matter where they have no jurisdiction, and where they would have apparently no right to act outside of their jurisdiction, as an agent for the injured individual, than to hold, as did the Appellate Division of the Third Department, in the case of Sullivan v. Hudson Navigation Co. (and other cases) 182 App. Div. 152, 169 N. Y. Supp. 645, that the payments received by the injured party were paid under a mistake of law and that the state Commission had no authority at all in the matter.

If this money was paid under mistake of law, there would seem to be no reason for holding that the libelant's right to sue in admiralty had been lost, nor to hold that the libelant must as a condition precedent restore the money paid before suing to recover in admiralty. The case is not one of rescission of contract with tender of consideration received. Drobney v. Lukens Iron & Steel Co., 204 Fed. 11, 122 C. C. A. 325.

It is, however, a situation where the money paid under the Compensation Law was on account of the injuries, and in so far as this money came from or belonged to the employer it should be treated as a payment on account, and would, of course, be deductible from the ultimate recovery, if there be any. In so far as these moneys came from the funds of the state of New York, or were in the nature of a gratuity, the libelant would be entitled to keep them as against his employer. Those questions can be disposed of at the trial.

In the meantime the exceptions to the answer will be sustained.

SUPREME COURT OF CALIFORNIA.

MARYLAND CASUALTY CO.

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.
(S. F. 8864.)*

1. MASTER AND SERVANT—ILLEGAL EMPLOYMENT—ENTIRETY OF CONTRACT.

Under St. 1915, p. 1205, § 10, inhibiting employment in certain places, during hours schools are in session, of a child of 15, not supplied with age

*Decision rendered, Feb. 11, 1919. 178 Pac. Rep. 858.

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and schooling certificate, his employment for all hours of the day, being an entirety, is illegal even after school hours.

(For other cases, see Master and Servant, Dec. Dig. § 95.)

2. MASTER AND SERVANT—ILLEGAL EMPLOYMENT—ATTENDING NIGHT SCHOOL.

Employment in a factory of a boy of 15, not supplied with age and schooling certificate, inhibited by St. 1915, p. 1205, § 10, is not saved from illegality by the fact that he is attending night school; considerations of public health and safety, as well as of education, entering into the statute.

(For other cases, see Master and Servant, Dec. Dig. § 95.)

Application by the Maryland Casualty Company for writ of review against the Industrial Accident Commission of California and others; an award for death of an employee having been made against petitioner as insurance carrier of the employers. Award and order annulled.

John Ralph Wilson and Charles B. Morris, both of San Francisco, for petitioner.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco (Christopher M. Bradley, of San Francisco, of counsel), for respondents.

WILBUR, J. An award was made by the Industrial Accident Commission against the petitioner as insurance carrier of respondents Bronstein and Le Blanc, employers of Frank T. Sharon, a minor of the age of 15 years and 2 months, in favor of the mother and sister of the employee, to compensate them for his death resulting from an elevator accident in the course of his employment. The petitioner claims that the loss is not covered by the terms of its policy of insurance for the reason that said employee was not legally employed, because such employment was in violation of the child labor law in force at the time the policy was issued. The respondents claim that the employment was legal, but, if not, that the provision of the policy excluding liability in cases of illegal employment was waived by the petitioner.

Prior to the accident and on the day that the employee was killed an insurance solicitor, who placed insurance in a number of different companies, for a commission, secured from the employers an agreement to take an insurance policy from the petitioner, covering liability under the Workmen's Compensation Law (St. 1917, p. 831). The solicitor observed Frank T. Sharon at work, and called the attention of the respondent employers to the liability incurred by them under the Workmen's Compensation Law for injuries to such employee, and urged them to take out an insurance policy to cover such liability, and received their verbal consent thereto. Subsequently the solicitor or broker reported to an agent of the petitioner authorized to issue policies the employers' application for this insurance, and requested that the same be issued as of noon, November 14, 1916. No inquiries were made by either the agent of the company in accepting the application or by the broker with reference to the age of Frank T. Sharon, and no statement was made in relation thereto by the employer. The broker had no knowledge of the age of the employee other than that derived by observing him, and no knowledge as to whether or not an age and schooling permit had been issued by the proper authorities. After the accident occurred and in pursuance of the previous arrangement, the petitioner, knowing that an accident had occurred resulting in the death of Frank T. Sharon, nevertheless issued its policy of insurance as agreed, containing the usual provision that it should cover "such injuries, including death, sustained by any employee legally employed" by Bronstein and Le Blanc. Petitioner subsequently learned that the decedent at the time of the accident was 15 years and

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2 months old, and that he had been employed without the issuance to him of any age and schooling certificate, as required by section 10 of the child labor law (St. 1915, p. 1205). Immediately upon learning these facts petitioner notified the employers that they would not waive that fact, and would stand on terms of the policy.

[1] It is clear from the unambiguous terms of the child labor law that the employment of Frank T. Sharon, a minor of the age of 15 years, was illegal without the issuance to him, and the presentation to his employer, of an age and schooling certificate (St. 1915, p. 1205, § 10), by the school authorities after proper investigation and proof to ascertain the truth of the facts therein certified. Section 13 of the child labor law provides:

"Any person, firm, corporation, agent or officer of a firm or corporation that * * * omits to comply with any of the foregoing provisions of this act, or that employs or suffers or permits any minor to be employed in violation thereof, is guilty of a misdemeanor. * * * " St. 1915, p. 1208.

The accident in question occurred at 4:30 in the afternoon. Section 10 provides:

"No minor of the age of fifteen years shall be employed, permitted or suffered to work in or in connection with any of the places enumerated in section 1 during the hours public schools are in session, unless such minor is provided with an age and schooling certificate as herein provided."

Among other places in which employment is prohibited by the provisions of section 1 so referred to is "any manufacturing establishment or workshop," which would include the employment in which the decedent was engaged at the time of his death. It is therefore argued that, even though the employment during the hours the schools were in session was illegal, without an age and schooling certificate, it was not illegal at the hour in question; for, although the schools of the city were in session November 14, they had adjourned before 4:30, and that therefore the decedent was not working "during the hours the public schools are in session." But the contract of employment was an entirety, and required the decedent to work six days in a week during the whole day and while school was in session. The contract was therefore one prohibited by the law, and the fact that the decedent might have been legally employed after school hours on the day in question does not alter the fact that the contract of employment in question was illegal and in violation of the plain terms of the law.

[2] Respondents, however, claim that in construing the child labor law the court should look to its purposes, and that, as the main purpose is to secure the education of the child, that purpose had been fully accomplished in the case of Frank T. Sharon by reason of the fact that he had entered a public night school on November 13th, and was intending to there continue his education. No consideration of the general purposes of the law would justify a departure from the plain provisions of the law, nor is it true that education was the main consideration entering into the child labor law. The compulsory school law (Stats. 1905, p. 388, and its amendments, 1907, p. 95; 1911, p. 949; 1915, p. 762) provides for the attendance of all children between 8 and 15 years, with certain exceptions. The age and schooling certificate required by the child labor law is also required by the compulsory school law, but the main purpose of the child labor law is, as therein stated, to prohibit children under ages from engaging in certain forms of labor. Considerations of public health and safety enter into the general plan as well as matters of education.

[3, 4] The employment being illegal, the question remains as to whether the illegality was waived by express agreement or necessary implication at the time the policy was issued, or thereafter. Respondents rely upon the well-established rule that conditions in the policy of insurance which would render it void ab initio, under facts known or readily ascertainable by the insurer, are waived by its issuance. But there are two insu-

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perable obstacles to the application of that rule in this case. First, the policy was not void ab initio. It insured all employees legally employed, and upon the issuance of a proper age and schooling certificate would have at once attached to the employment in question, or would apply to any other employee taking the place of said employee. Second, the petitioner had no knowledge of the illegality of the employment in question (even assuming that the knowledge of the solicitor of the insurance was the knowledge of the company), and had a right to assume that the contract of employment was legal. For the petitioner was entitled to indulge in the presumption that the employer was innocent of crime, at least until notice of some fact inconsistent with such innocence. Knowledge of the exact age of the boy would not be inconsistent with innocence, because it was lawful to employ such a boy if provided with proper proof of his age, viz., the age and schooling certificate required by law. While it is true that fire insurance companies that have issued policies without written application and without inquiry have been held chargeable with notice of facts which might have been readily ascertained concerning the condition of the title to the property insured at the time of the issuance of the policy, and therefore to have waived conditions in the policy which would render the policy void by its terms, upon the facts, no case has been found that goes so far as to require the insurance company to ignore the presumption of innocence of crime.

[5] It is urged by respondents that the insurance in question was oral, and that, as it applied specifically to the employee it was binding. The utmost that can be said of the verbal agreement, ignoring all questions as to the authority of the agent, which may well be doubted (Sharman v. Continental Ins. Co., 167 Cal. 124, 138 Pac. 708, 52 L. R. A. [N. S.] 670), is that it was an agreement to insure or to issue insurance upon the usual terms contained in the company's policies. As was said concerning an agreement to insure by the Supreme Court of the United States, in Eames v. Home Ins. Co., 94 U. S. 621, 629 (24 L. Ed. 298):

"It will presumed that they contemplate such form of policy containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

The contention, therefore, that the insurance in question was oral, and therefore did not contain the clause confining liability to legal contracts, cannot be sustained.

[6] There is no significance in the issuance of the policy after the death of the employee, and the cases of fire insurance in which such issuance after a loss have been held to waive certain conditions do not apply to this character of insurance, where the policy is a continuing liability even after an accident, nor, for the same reason, does the acceptance or retention of the premium under the circumstances operate as a waiver

On the whole, therefore, the contract of employment, in violation of the child labor law was illegal and not included in the policy of insurance (Mt. Vernon Co. v. Frankfort Co., 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636), and, there being no waiver or estoppel, the petitioner is not liable under the policy for the accident in question.

The award against the petitioner and the order substituting it for the employers are annulled.

We concur: Angellotti, C. J.; Melvin, J.; Shaw, J.; Lennon, J.

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SUPREME COURT OF CALIFORNIA.

MILLER & LUX INCORPORATED

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA.
(S. F. 8853.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS BY INDUSTRIAL ACCIDENT COMMISSION—REVIEW.

Findings of fact by which Industrial Accident Commission determines itself clothed with jurisdiction are reviewable by Supreme Court on certiorari.

(For other cases, see Master and Servant, Dec. Dig. § 417[3].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NATURE AND THEORY OF LIABILITY.

Workmen's Compensation Act 1913 is held constitutional only because it imposes a charge, not only upon individual employer, but upon branch of industry in which he is engaged, and gives employer opportunity to protect himself by proper insurance.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AGRICULTURE.

Under Workmen's Compensation Act 1913, § 14, if a worker upon farm may be reasonably classified as one engaged in agriculture, his employer is not liable under Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 363.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"ENGAGED IN FARM LABOR."

A workman whose sole duty is to repair wagons in shop operated on farm for purpose of keeping agricultural implements and vehicles used on farm in order is "engaged in farm labor" within meaning of Workmen's Compensation Act 1913, § 14.

(For other cases, see Master and Servant, Dec. Dig. § 363.)

In Bank.

Proceedings under the Workmen's Compensation Act by W. V. Fish, to obtain compensation for personal injuries, opposed by Miller & Lux Incorporated, the employer. There was an order of the Industrial Accident Commission in favor of the applicant, and the employer brings certiorari. Award annulled.

Edward F. Treadwell, of San Francisco, for petitioner.
Christopher M. Bradley, of San Francisco, for respondent.

MELVIN, J. Certiorari to review an award of the Industrial Accident Commission in favor of W. V. Fish and against petitioner Miller & Lux Incorporated.

The findings of the Industrial Accident Commission upon which the attack of petitioner's counsel is directed, are as follows:

* Decision rendered, Feb. 17, 1919. 178 Pac. Rep. 960.

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"(1) That W. V. Fish, hereinafter called the employee, the applicant herein, was injured on the 15th day of December, 1917, at Buttonwillow, Kern county Cal., while in the employment, of defendant, Miller & Lux, Incorporated, hereinafter called the employer, as a wagon maker in a shop operated by the employer for the sole purpose of repairing vehicles and implements used by the employer in its farming operations, the whole time of the employee being given to said occupation.

"(2) That said injury arose out of and in the course of said employment, was proximately caused thereby, and occurred while the employee was performing service growing out of and incidental to the same, as follows: His right hand was caught in a moving planer, the wound becoming infected.

"(3) That the time of said injury the employee was not engaged in any of the occupations or employments excluded by section 14 of the Workmen's Compensation, Insurance and Safety Act of 1913 from the provisions of said act, and that said injury was not caused by willful misconduct or intoxication of the employee."

[1] It is argued by the counsel for respondent that the third finding is conclusive—that in such cases we cannot go behind the determination of the commissioners upon matters of fact. In this behalf he cites Smith v. Coles (1905), 93 L. T. 754, 8 W. C. C. 116 (Minton-Senhouse). It is true that in that case, in which the county court judge had found that a carpenter employed about a farm as a handy man was a workman in agriculture, certain of the justices held that, there being evidence to support the finding, they might not upset it, but in the matter at bar the learned commissioners found as a probative fact that the applicant was employed "as a wagon maker in a shop operated by the employer for the sole purpose of repairing vehicles and implements used by the employer in its farming operations, the whole time of the employee being given to said occupation." It is clear, therefore, that the ultimate finding is really based upon the probative facts found, and if they fail to establish the jurisdiction of the commission petitioner must succeed. Findings of fact by which the Industrial Accident Commission determines itself clothed with jurisdiction are reviewable by this court. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35. The sole question, therefore, is whether or not a workman, whose sole duty is to repair wagons in a shop operated on a farm for the purpose of keeping the agricultural implements and vehicles used on the farm in order, is engaged in farm or agricultural labor within the meaning of section 14 of the Workmen's Compensation Act. St. 1913. p. 284.

[2-4] At the threshold of the inquiry we should keep in mind the fact that the Compensation Act is held constitutional only because it imposes a charge, not upon the individual employer, but upon the branch of industry in which he is engaged, and gives the employer opportunity of protecting himself by proper insurance. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398. The law of California has exempted the farming industry from the operation of this statute, and if a worker upon a farm may be reasonably classified as one engaged in agriculture, his employer is clearly entitled to the benefit of this exemption. While it is true that an employer may be engaged in several sorts of industry, some of them within and some of them without the purview of the Commission Act, and that an employee may at different times do work of one kind or the other, it is equally a fact that, where from the great extent and complexity of farming operations on a given rancho the work of the farmers is classified, and each is given a limited, rather than a diversified, duty, that circumstance alone will not make some of them artisans rather than agriculturists. Numerous illustrations suggest themselves. If the mower who stops to use a whet stone on his scythe remains a farmer, is the boy who is set to work

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sharpening all the farming tools used on the place engaged in an occupation entirely outside of farming? Clearly not. So it has been held that a woodchopper or one removing stumps or brush from a farm is not an artisan within the contemplation of the act. Miller v. Algar, 2 I. A. C. Dec. 558; Martin v. Russian River Fruit & Land Co., 1 I. A. C. Dec. (part 2) p. 18; Whitney v. Peterson, 1 I. A. C. Dec. 306. Commenting upon two of the authorities last cited, this court (all the justices participating) has used the following language:

"The Accident Commission has held that a woodchopper engaged in cutting and burning trees in clearing land for farming purposes is engaged in farm labor. Whitney v. Peterson, 1 Decisions of the Industrial Accident Commission of California, p. 306. It has also been held that when land has been cleared for agriculture, one who operates a saw to cut the wood on the cleared land into suitable lengths for sale is engaged in farm labor. Miller v. Algar, 2 Industrial Accident Decisions, 584. If Snow had been found to be an employee on the farm who, as part of his duties, was required to repair the tractor, we could not see how he could be adjudged not a farm laborer under those decisions." Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, at page 750, 158 Pac. 1031, at page 1032.

This aspect of the matter has been aptly discussed by the Supreme Court of New York in the case of Coleman v. Bartholomew, 175 App. Div. 122, 124, 161 N. Y. Supp. 560, 561 as follows:

"It was clear intent of the Legislature to exclude farm laborers from the benefits of the Compensation Law, and it only remains for us to define 'farm laborers.' The common hired man on a farm is required to perform a geat variety of work. His duties are not confined to plowing, planting, and harvesting. Tilling the soil and garnering the crops may be the principal work of the farm laborer, but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harnesses, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is a part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new point on a plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market, and innumerable other familiar duties."

In that case the farm laborer was engaged, when injured, in repairing the roof of a barn.

But, at the outset of the argument in his brief, counsel for the Industrial Accident Commission insists that the question before us has been settled in California adversely to petitioner's contention, and cites in that behalf George v. Industrial Accident Commission, 174 Pac. 653, and Miller & Lux Incorporated v. Industrial Accident Commission, 32 Cal. App. 250, 162 Pac. 651. We cannot agree with that view. In the George Case that claimant was found to be engaged in two occupations for the same employer, and his duty at the time of the accident was found to be that of a gardener. This court sustained the Industrial Accident Commission upon the finding that in his capacity as a gardener the applicant might not recover—a conclusion which supports rather than opposes the argument of petitioner in the matter now before us. The other proceeding dealt with a case in which a man was and had been for many months engaged in the building of a house and was injured while so occupied. The Industrial Accident Commission found that petitioner was engaged in the business of wholesale and retail butcher, wholesale and retail merchandising, farming, horticulture, and real estate dealing. It did not appear that the house which the injured man was helping to build was to be used for any particular sort of fellow workmen. In this

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state of the record the learned district Court of Appeal used the following language in the opinion:

"We are unable to follow the refinement of the petitioner's reasoning so far as to hold that because the operations of the petitioner are so diversified and extensive as to require regular employment of carpenters in the construction, improvement, and repair of buildings upon the ranch properties, that such artisans when so employed are to be regarded as engaged in farm labor."

In the matter now under discussion there was an entirely different record involving the employment of the workman upon repair of vehicles used in the farming operations of his employer alone.

While the authorities on this branch of the compensation statutes of the various jurisdictions are somewhat in conflict, the weight and the better reasoning support the contention of petitioner that the repairing of farming machinery on the farm, in a shop devoted to such repairs, is an agricultural pursuit, and is one of the employments excluded by provisions similar to section 14 of the Workmen's Compensation Insurance Safety Act.

In Shafer v. Parke, Davis & Co., 192 Mich. 577, 159 N. W. 304, the workman was injured while engaged in caring for horses on a farm. While the farm was one owned by a manufacturer of chemicals and was conducted principally for the production of serums for the laboratory, the Supreme Court of Michigan held that the injured man was a farm laborer. Respondent's counsel insists that this case supports his contention that the statute does not classify the employee by the ordinary business of his employer, but by the kind of work he, himself, is employed to do. This is only partly true because in determining the class of labor in which an employee is engaged, it is often necessary to take into consideration the work ordinarily done by persons in the kind of business which the employer is conducting. A man repairing broken harness for use on a farm is, in a sense, doing the same sort of work to which he might be assigned in a saddler's shop in town, but that mere fact does not classify him as a person engaged in manufacturing because the custom of farmers, from time immemorial, has been to make minor repairs of that sort. There are good examples of the rule that laborers may be classified as farm workers, although not actually tilling the soil. Such illustrations are to be found in those decisions upon statutes giving to agriculturist lien for their work. A cook for a threshing crew, who asserted a lien as a farm laborer, was held to be entitled to it, as her work contributed directly to the garnering of the crops. Stevenson v. Magill, 35 N. D. 576, 160 N. W. 700, L. R. A. 1917D, 377. In Winslow v. Urquhart, 39 Wis. 260, a cook for a logging crew was held to be performing labor in cutting and moving logs; and in Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep 545, a cook for the men in a logging camp, and a blacksmith employed to mend the tools and sleds and to shoe the horses used in the logging business were both held to be entitled to liens under a like statute. Our own Industrial Accident Commission of California has decided that a cook employed in a cattle ranch to prepare meals for the workmen was engaged in farm labor stock raising, and was excluded from the provisions of the Compensation Act. Olsen v. Rogers Development Company, 2 Ind. Acc. Com. 560.

In Sylcord v. Horn, 179 Iowa, 936, 162 N. W. 249, it was decided that one assisting in the operation of a corn shredder on a farm is a "laborer engaged in agricultural pursuits."

In State v. District Court of Watonwan County, 140 Minn 398, 168 N. W. 130, a man who fell from a harvester upon which he had been making repairs was held to be a "farm laborer," the court following Sylcord v. Horn, supra, and citing without approval White v. Loades, 178 App. Div. 236, 164 N. Y. Supp. 1023, which was a case of a man injured while putting a threshing machine in a barn. While it is de-

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clared in the opinion in the case last cited that "a man who is traveling through the country with a machine, and stopping from place to place to thresh out the grain and beans of the farmers for a compensation, is not engaged in farming, and his employees are not farm laborers," compensation seems to have been awarded upon the theory that at the time of the accident the employee was engaged in the "operation of a vehicle," and was thus brought within the scope of the compensation statute of New York.

In Vincent v. Taylor Bros., 180 App. Div. 818, 168 N. Y. Supp. 287, a workman connected with a traveling thresher was injured while feeding bundles into that machine on a farm on which his employer had undertaken to do the threshing. The work was found not to be "milling," as the commission had declared it to be, and the award was therefore set aside. The court held that the facts did not bring the accident under the rule of White v. Loades as to vehicles, but followed that case upon the dictum that the employee was not a farm laborer. However, the case was sent back for further hearing, Mr. Justice Lyon, who prepared the opinion, using the following language:

"Whether facts may have been disclosed by the investigation of the commission, which do not appear in the record, but which influenced the deputy commissioner, before whom the proofs were heard, to make the award—for instance, that the employers were in fact engaged in the milling business, and that threshing was incidental to their acquiring the grain for such business—does not appear, nor has the commission so found."

In re Boyer (Ind. App.) 117 N. E. 507, holds squarely, however, that a man is not a farm laborer who works on a separator that goes from farm to farm, and is operated as an independent business, although the injury was received while the claimant was threshing wheat. The decision really rests upon an analogy between the threshing by an independent contractor and the work of a miller. The following sentence in the opinion illustrates well the fact that the "threshing machine cases" are of small value in deciding the question now before this court:

"If farmers generally owned threshing outfits, and were in the habit of threshing their own grain, and the claimant had been employed by the farmer to assist in the work of threshing, and had been injured while doing such work, a more serious question would be presented."

That a farm laborer who assists his employer during the winter in getting out logs cut on the farm is nevertheless a farm laborer when so doing was held in Brokett v. Mietz, 184 App. Div. 342, 171 N. Y. Supp. 412.

It was held, however, that a country club which cut and sold lumber regularly from a large tract of land owned by it was engaged in logging for pecuniary gain, although the work was incidental to the main business of operating a country club. Uhl v. Hartwood Club, 221 N. Y. 588, 116 N. E. 1000.

From the foregoing it appears, we think, that the great weight of authority, as well as the better reasoning, brings the claimant who was repairing vehicles and implements on the farm within the class of persons excluded from the operation of the Compensation Act because engaged in "farm labor."

The award is annulled.

We concur: Angellotti, C. J.; Shaw, J.; Wilbur, J.; Lennon, J.

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SUPREME COURT OF CALIFORNIA.

STEVENS ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.
(L. A. 5746.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—SUFFICIENCY OF EVIDENCE—DEATH DURING PERFORMANCE OF DUTY.

In proceedings under the Workmen's Compensation Act for compensation for the death of a café waiter, shot while approaching scuffle between another waiter and armed customer, the fact that it was waiter's duty to keep order *held* sufficient to sustain award.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

In Bank.

Proceeding under the Workmen's Compensation Act by Merle Lindlaw, for herself and as guardian ad litem and trustee of John Robert Lindlaw, for compensation for the death of John Robert Lindlaw, opposed by C. A. Stevens and another, as employers, and the Ætna Life Insurance Company, a corporation, as insurer. Award for petitioners by the Industrial Accident Commission, and employers and insurer bring certiorari to annul the award. Award affirmed.

E. L. Stockwell, of San Francisco, Leland Mann, of Los Angeles, and Redman & Alexander, of San Francisco, for petitioners.

Christopher M. Bradley, of San Francisco, for respondents.

LENNON, J. The petitioner herein, the Ætna Life Insurance Company, seeks, as the insurer of certain café owners against liability under the Workmen's Compensation Act (St. 1913, p. 279) to annul by certiorari an award made by the Industrial Accident Commission in the sum of $5,000 to Merle Lindlaw for herself as the widow of John R. Lindlaw and as guardian ad litem and trustee of her infant son, John Robert Lindlaw. The writ is prayed for on the ground that the evidence does not justify the findings of fact or the order of award.

Substantially stated, the facts are these: John R. Lindlaw was employed as a waiter in a café at Venice, Cal. On a September afternoon in 1917, one E. E. Rice, accompanied by his wife, entered the café. He was joined some little while later by his son. After the party had been served, Rice got into an altercation with one Sullivan, a waiter attending an adjoining table, during the course of which he threatened picturesquely to make Sullivan "jump over the housetops," and drew a revolver. Sullivan grappled with Rice, as did the latter's son and one Ealand, another waiter, called by Sullivan to help disarm Rice. Lindlaw, serving other tables in the café, started for the scene at this juncture, calling "Come on, Brown," to yet another waiter. As Lindlaw approached the scuffle the revolver, still in Rice's hand, was discharged, the bullet striking Lindlaw and killing him. Brown, following Lindlaw, caught him as he fell.

The paramount point presented for review is whether or not Lindlaw in starting for the scene of altercation, was performing a duty incident to his employment as a waiter in the café. In a word, if it was incumben

*Decision rendered Jan. 2[illegible], 1919. 178 Pac. Rep. 296.

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on Lindlaw as a part of his duties as a waiter in the café to help keep order and suppress commotion, then he was killed in the performance of his duties and the award must stand; and it needed only to be shown that the hazard was one to which deceased was exposed by his employment to warrant the award. Western Indemnity Co. v. Pillsbury et al., 170 Cal. 686, 151 Pac. 398. On this point the evidence seems crystal clear. One of the owners of the café testified that it was a part of the duties of waiters in his employ to assist in keeping order, to quell disturbances, and eject unruly persons. It was also admitted to be a fact in the case that the employees in the café had instructions to keep order. The waiter Brown testified, in effect, that relative to an altercation arising in the café it was as much the duty of the waiters as any other part of their waiters' business to go there and try to stop it as quickly as possible. Considered in connection with the testimony of the witness McFadden, identified with café life for a period of 25 years, to the effect that the café in question was what is known as a cabaret house, "catering to a class of people that are subject more or less to brawls and things of that kind that will cause trouble, and especially where there is dancing," and that this particular café was "a type of house that would be in trouble quicker than any average house at the beach," it follows that the employer's business in the instant case was such as to expose his employees to the danger of bodily injury ensuing upon altercations by disorderly patrons. What Lindlaw's intentions were as he started towards the altercation must, of course, remain unknown; but it is obvious he was not intending to start the fight, since it was already started, and it is reasonable to assume, therefore, that he was intending only to assist in stopping it and that, as an employee of the cafe, it was his duty to assist in stopping it, seems from the uncontradicted evidence to admit of little doubt and less speculation.

Petitioners' citations relied on in support of the petition for the writ are not sufficiently analogous in point of principle or of fact to warrant discussion, nor do they at all cover and control the situation presented here, namely, one in which an attendant is charged as part of his duties to quell or assist in quelling disturbances and to eject disorderly persons in a cabaret house where alcoholic liquors are sold, and is injured in the course of a brawl started by a disorderly patron.

It follows, from what has been said, that it does not appear as a matter of law that there was not sufficient evidence to warrant and sustain the award.

The award is affirmed.

We concur: Angelotti, C. J.; Melvin, J.; Wilbur, J.; Richards, Judge pro tem.; Shaw, J.

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DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 1, CALIFORNIA.

MASSACHUSETTS BONDING & INS. CO.

v.

SAN FRANCISCO-OAKLAND TERMINAL RYS. (Civ. 2489.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ASSIGNMENT OF CLAIM BY EMPLOYEE.

Workmen's Compensation Act of 1913, §§ 31, 34, subd. "f," permit assignment of injured person's right of action against tort-feasor not previously sanctioned by law, and provide that making by injured employee of lawful claim for compensation under act against employer and latter's insurer shall operate as transfer of legal title to his claim for damages against tort-feasor to employer or to the latter's insurer paying claim.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PAYMENT OF CLAIM BY INSURER—RIGHT OF ACTION AGAINST TORT-FEASOR.

Use of the word "subrogated," in Workmen's Compensation Act of 1913, § 31, construable in connection with section 34, subd. "f," did not render right of action against tort-feasor acquired by employer's insurer, which paid claim of the injured workman, an equitable cause of action as against tort-feasor, though as between insurer and employee right of subrogation was equitable right arising out of payment of employee's claim.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from Superior Court Alameda County; J. J. Trabucco, Judge.

Action by the Massachusetts Bonding & Insurance Company against the San Francisco-Oakland Terminal Railways. From judgment for plaintiff, defendant appeals. Reversed, with directions to enter order dismissing the action.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco, for appellant

John Ralph Wilson of San Francisco for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $212.82 and costs of suit. The facts of the case, so far as pertinent to the determination of the main question presented upon this appeal, are these: On October 1, 1914, one Manuel Silva was an employee of one A. H. Kopperud, and was engaged in work for his employer on Fourteenth avenue in the city of Oakland, when a street car, operated by or for the defendant, coming along said Fourteenth avenue, came in contact with an auto truck which was standing near where said Silva was at work, and caused said auto truck to strike the latter and severely injure him. At the time of said injury Silva's employer, Kopperud, was carrying insurance for his employee pursuant to the provisions of the Workmen's Compensation Act of 1913 (St. 1913,

* Decision rendered, Jan. 17, 1919. Rehearing denied by Supreme Court March 13, 1919. 178 Pac. Rep. 974.

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p. 279); the plaintiff herein being his insurer. Immediately after said injury the plaintiff caused Silva to be removed to a hospital, and there provided with medical and surgical treatment and medicines, amounting in all to the sum of $212.82. Thereafter, and on the 16th day of January, 1915, Silva undertook to make a settlement of his claim for damages for its alleged negligent acts and his consequent injuries with the defendant herein, in the course of which the defendant paid to him the sum of $300, receiving therefor from said Silva a full receipt and discharge of all claims and demands on account of said injury. Thereafter said Silva filed an application for an award against his employer, Kopperud, and the latter's insurer, said plaintiff, before the Industrial Accident Commission, which came on for decision in the month of July, 1915. From the decision of the commissioner then rendered it appears that a showing was made as to the acceptance by said Silva of the sum of $300 from the defendant herein, and of the execution by him of the receipt purporting to be a full release of said defendant from all liability on account of his said injury. The commission thereupon made an award in favor of said applicant in the sum of $103.07, which the plaintiff herein paid, and which, with certain sums which it had already expended for medicines, etc., made up the aggregate of $212.82, for which it brings this action.

The complaint herein is denominated a complaint in equity, and in it the plaintiff avers substantially the foregoing facts, and further avers that the defendant herein, in making the aforesaid settlement with said Silva, did so with knowledge that said Silva had a lawful claim for compensation against his employer and the latter's insurer which was presentable before the Industrial Accident Commission, and that the intent of the defendant in making such settlement and in taking said full receipt and release thereon was to destroy any right which the plaintiff, as the insurance carrier of said Silva's employer, had or might have to commence and prosecute this action against said defendant, pursuant to the provisions of the Workmen's Compensation Act. The plaintiff also included in its complaint a demand for the sum of $100 as attorney's fees.

The defendant appeared in this action and demurred upon the ground of a want of jurisdiction in the superior court over the subject-matter of the action, and, this demurrer being overruled, it answered, again urging the objection as to the court's want of jurisdiction. It also pleaded the making of the settlement with Silva above referred to, and set forth in its answer the receipt in terms.

The trial court gave judgment for the plaintiff for the amount claimed in accordance with the award of the Industrial Accident Commission, but denied the plaintiff's right to recover any sum as attorney's fees.

The first and main question raised by appellant on this appeal is that of the jurisdiction of the trial court over the subject-matter of this action. The appellant contends that the plaintiff's claim, if it exists at all, is for the total sum of $212.82, and that its cause of action therefor is purely a legal, as distinguished from an equitable, claim, and hence that its action should have been commenced in the justice's court. The determination of this question depends upon the construction to be placed upon section 31 of the Workmen's Compensatiaon Act of 1913. That section reads as follows:

"The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee, or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party. The amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents is entitled, shall not

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be admissible as evidence in any action brought to recover damages, but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employee or other person entitled."

The foregoing section is, in respect to its application to the instant case, to be read in connection with subdivision "f" of section 34 of the same act, which reads as follows:

"Where any employer is insured against liability for compensation with any insurance carrier and such insurance carrier shall have paid any compensation for which the employer was liable, or shall have assumed the liability of the employer therefor, it shall be subrogated to all the rights and duties of the employer and may enforce any such rights in its own name."

[1] A proper construction of these provisions of the Workmen's Compensation Act in our judgment is that they were intended to permit what has not heretofore been sanctioned by law, viz. an assignment of an injured person's right of action against his tort-feasor, and to provide that the making by him of a lawful claim for compensation under the terms of the Workmen's Compensation Act against his employer, and the latter's insurer, should operate as a transfer of the legal title to his claim for damages against his said tort-feasors to his employer, or to the latter's insurer, paying such claim. This has in effect been so held by this court in the recent case of Bassot v. United Railroads, 177 Pac. 884.

[2] The respondent insists, however, that the use of the word "subrogated" in the foregoing provisions of the Workmen's Compensation Act rendered the right of action acquired by the plaintiff thereunder an equitable cause of action as against the defendant herein. We do not agree with this contention; for, while it is true that as between the plaintiff and Silva the right of subrogation would be an equitable right arising out of the payment by the former of the latter's claim for damages, still, when such payment had been made, and the assignment of Silva's cause of action against the defendant herein consummated by such subrogation, the right thus accrued in the plaintiff was that of maintaining, as the assignee of Silva, the same action which Silva could have maintained against this defendant had no such assignment been made.

[3, 4] If we are correct in these views, then it follows necessarily that the plaintiff in this action, having paid the amount of the lawful claim of Silva against his employer, Kopperud, as the latter's insurer, became thereby invested with Silva's right of action for damages against the defendant in this action. Such right of action, if any, existing in Silva was essentially a legal, and not an equitable, action; and, had the same been commenced by him to recover an amount less than $300, it must have been commenced in the justice's court; and it may here be said that, had Silva commenced his said action in the superior court, he could not have conferred jurisdiction upon that tribunal by including in his claim for damages, amounting to less than $300, a demand for an attorney's fee, augmenting his claim to an amount in excess of said sum; and it need hardly be added that the plaintiff herein, assuming its right of action to be nothing more nor less than Silva's assigned right of action, could not give the superior court jurisdiction over it by asserting a claim for the recovery of attorney's fees which are not allowable by law in such actions.

[5] The respondent, however, insists that it has given this action the nature and qualities of an action in equity by the averments in its complaints to the effect that the defendant, in making its settlement with Silva, and taking his full release knowing that Silva had or had made a lawful claim for compensation against his employer, had done

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so with the intent and purpose of destroying or attempting to destroy any right which this plaintiff, as the insurer of Silva's employer, might have to a further recovery against the defendant in the event of its payment of such lawful claim pursuant to the provisions of the Workmen's Compensation Act. We are unable, however, to perceive that the legal status of the plaintiff's right of action is in any wise changed by this averment. If at the time of the defendant's alleged settlement with Silva he had a lawful claim against his employer arising out of his injury, the making of such claim had operated, under the forgoing clauses of the Workmen's Compensation Act, to transfer to his employer or the latter's insurer Silva's right of action for damages against the defendant as fully as though he executed a written assignment of his cause of action. This being so, no settlement which the defendant made with Silva could have been effectual to destroy or impair the already transferred right of action in the employer or insurer, no matter what the defendant's intent or purpose might have been in any settlement which it might thereafter make with Silva; and hence the averment of such intent or purpose would be immaterial as affecting the nature of the plaintiff's right of action.

If, on the other hand, the said Silva did not have or had not made a lawful claim against his employer or the latter's insurer at or prior to the time of his said settlement with the defendant, then his said settlement and receipt and release in full of all his claims for damages would have been effectual to destroy any subsequently assigned right of action; and in such event the plaintiff's averment of the defendant's intent and purpose as to that effect would be equally immaterial to its asserted cause of action.

Our conclusion from the foregoing views is that the plaintiff's assigned right of action against the defendant to recover the sum of $212.82 upon a claim which had its origin in the damages which its assignor Silva was entitled to recover by reason of his injuries suffered through the defendant's negligence was strictly a legal action for damages in a sum less than $300, over which the superior court had no original jurisdiction, and hence that the defendant's demurrer on that ground should have been sustained.

This view of the case renders immaterial the other points discussed upon this appeal.

The judgment is reversed, with direction to the trial court to enter an order dismissing the action.

We concur: Waste, P. J.; Kerrigan, J.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

SECOND DISTRICT, DIVISION 1, CALIFORNIA.

MARYLAND CASUALTY CO. ET AL.

v.

INDUSTRIAL ACCIDENT COMMISSION ET AL. (Civ. 2691.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"COURSE OF EMPLOYMENT."

Where an employee, while driving an automobile with which he was not familiar and which was owned by a fellow employee, who accompanied him on business for his employer, was killed in a collision with an electric

* Decision rendered, Dec. 20, 1918. 178 Pac. Rep. 542.

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car, no injunction being laid upon them by their employer as to who should operate the machine or what kind should be used, he was acting within the course of his employment within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"WILLFUL MISCONDUCT."

Where an employee on his master's business was killed in collision with an electric car, while driving an automobile, his unfamiliarity with that particular kind of machine constituted negligence on his part only, and not willful misconduct so as to defeat an award of compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.)

Proceedings under the Workmen's Compensation Law (St. 1917, p. 831) by Mrs. Dora E. Showalter and Roland L. Showalter, a minor, by his guardian ad litem and trustee, Mrs. Dora E. Showalter, claimants, to recover for the death of F. R. Showalter, employee, opposed by the Maryland Casualty Company, insurer, and the Union Hardware & Metal Company, employer. From an award of the Industrial Accident Commission in favor of claimant, the insurer and employer bring certiorari. Award affirmed.

H. W. Kidd, of Los Angeles, for petitioners.
Christopher M. Bradley, of San Francisco, for respondents.

JAMES, J. Certiorari to review proceedings and determination made by the Industrial Accident Commission under which there was an award of compensation to the widow of F. R. Showalter. Showalter was an employee of petitioner Union Hardware & Metal Company. He died as a result of injuries received by collision between an interurban electric car and an automobile which he was driving. There is no dispute as to Showalter having been in the employ of the company mentioned on the day when the injuries were received, or that he was at the time traveling from the city of Los Angeles to the city of San Pedro on business of his employer. Petitioners contend, however, that under the evidence no award should have been made, because of the willful misconduct of the deceased, and because Showalter, at the time he suffered the injuries, was not performing an act in the course of or growing out of his employment. The testimony heard by the commission showed that Showalter and one MacKenzie were employed at the large mercantile establishment of the petitioner Union Hardware & Metal Company; that they were subject to the orders of the secretary; that the secretary desired them to go to the city of San Pedro and make the acquaintance of certain agents of a shipbuilding plant. This for the purpose of facilitating sales between the company and the shipbuilders. The secretary designated the day on which the men were to go, and the two employees started on the morning of the day mentioned to make the journey. MacKenzie owned a small automobile which he was in the habit of using on the business of the company, and for the use of which compensation was made to him—at least he was reimbursed for the fuel used. Showalter also owned an automobile of a different kind. The secretary of the corporation testified that after arranging for the trip of the two men, he heard talk between them to the effect that they would take Showalter's machine. They did

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not do this, but started on the trip in the small machine owned by MacKenzie. No dispute is made but that, in so far as the choice of an automobile was concerned, it was immaterial to the company what machine was used, and that whatever selection was made in that regard the company approved of it. It appeared that Showalter was an experienced driver of an automobile. He was not, however, accustomed to the use of the kind of machine used for the particular trip which was undertaken on the day in question. After leaving the more congested portion of the city, MacKenzie, who had operated the machine up to that point, exchanged seats with Showalter, and Showalter proceeded from then on to guide and control the machine. The men had proceeded to a point on South Main street, where an interurban car line crossed that thoroughfare, and at that point the automobile was struck by a trolley car. MacKenzie testified at the hearing before the commission, and was asked to state the circumstances. We quote portions of his testimony:

"We saw the car, and we kind of slowed down, and Mr. Showalter was not used to driving a Ford car, and we never realized any danger when we first saw the car."

MacKenzie further stated that the car was from 150 to 200 feet away when they saw it. The following further testimony was given by this witness:

"Q. Was it coming at a good rate of speed? A. Apparently it was, from the way it struck the machine. Q. What kind of a driver was Mr. Showalter? A. He was a very careful man. Q. In your opinion, was he exercising due care and caution at this particular time A. Absolutely. Q. Then what, in your opinion, was responsible for the accident? A. His lack of knowledge of the machine. That is the only thing that I can account for it. * * * Q. You were showing him how to operate a Ford car when this accident happened? A. Yes, sir. I showed him different points on it. Q. And isn't it further a fact that it was at his request that you let him drive the car? A. Yes, sir. Q. Didn't he say to you in substance that he wanted to learn how to drive a Ford car? A. Yes, he said he would like to learn. Q. And it was at that time that you let him take the wheel of the car? A. No, we talked machines quite a long time going down there. He was quite enthusiastic about mechanics and so forth, and we were talking of different machines, and he was asking me different points on the machine and so forth, and he seemed to understand parts of it, and other parts he did not understand, and I tried to explain to him what he didn't understand * * * Q. What, if any, change was there in the speed of your automobile from the time you first saw the car until the accident occurred? A. As I say, the car kind of slowed down at first. Q. The automobile? A. Yes. Q. Did you say anything to Mr. Showalter about slowing up? A. Yes, I called his attention to it. I said, 'There is a car, Rolly; I think we had better slow down a little bit.' Q. What, if anything, did he say to you in reply? A. He slowed the car down. Q. What do you think was the cause of the accident? A. I think the cause of the accident was simply his not being familiar with the machine. * * * Q. Didn't the car suddenly shoot ahead just before the accident happened—the automobile, I mean? A. It seems to me that it did; as far as I can remember, it did. * * * Q. And it was the first time he had ever driven a Ford car? A. Yes."

The motorman of the electric car which collided with the automobile testified that he saw MacKenzie immediately after the accident, and that MacKenzie came up to him and told him that he had told Showalter to "go ahead; he could make it." MacKenzie testified that he had no recollection one way or the other about having made that statement.

[1, 2] In our opinion, this evidence fails to sustain the contention of petitioners that at the time Showalter suffered his injuries he was not

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engaged in an act arising out of his employment, or that he was guilty of willful misconduct. It was conceded that the men had the right to travel by an automobile of their own choosing, and the employer laid no injunction upon them as to who should operate the machine. No doubt, by the conduct of Showalter, the risk of injury was enhanced because of his lack of familiarity with the machine he was engaged in driving, but contributory negligence constituted no defense. The case is not unlike that shown in Rideout Co. v. Pillsbury et al., 173 Cal. 132, 159 Pac. 435. There a deck hand working on a barge fell from the deck of the same and was drowned. It was shown that his duties consisted only of helping to unload the barge; that the loading had been done and the barge was on its way from San Francisco to Oakland, at which latter place it was to be unloaded. The deck hand had no duties to perform during the voyage. There was a house provided for the men to remain in while crossing the bay, and they were free to amuse themselves there if they chose. The deck hand did not remain in the house, but was observed by another employee outside on the deck, leaning against a post, apparently asleep. This employee took hold of the deck hand's clothing and aroused him saying: "Frank, you crazy? Come on inside." The deck hand answered: "No; leave me alone." He was left there, and later his body was found floating in the waters of the bay. An award was made by the commission and affirmed by the Supreme Court. In that case it is plain that the employee was negligent in leaving the safe place provided by his employer for his accommodation and remaining upon deck and going to sleep in a place where he was likely to be thrown overboard. Assuredly he greatly added to the risks of his employment, but such act on his part constituted negligence only, which was no bar to a recovery under the statute. In Elk Grove Union High School Dist. v. Industrial Accident Commission, 34 Cal. App. 589, 168 Pac. 392, it is said:

"A person is not to be denied compensation under the Compensation Act merely because his injury has been superinduced by mismanaging the duties of his employment, unless such mismanagement amounts to willful misconduct."

Had orders been given by the employer of Showater forbidding him to operate any particular automobile which might be used on the business of the company, then perhaps a violation of that injunction might amount to willful misconduct. U. S. Fidelity, etc., Co. v. Industrial Accident Com'n, 174 Cal. 616, at page 621, 163 Pac. 1013. As we have before stated, however, no such instructions were given to Showalter or MacKenzie; the men had freedom of choice as to the automobile to be used, and so also apparently as to the driver who might operate it. And so we conclude that the act of Showalter in driving the automobile at the time in question was, in view of his inexperience in the handling of that particular machine, a mere act of negligence which was the proximate cause of the injury, but which act in no way interposed as a bar to prevent an award of compensation being made.

The total award made by the commission to the widow, for herself and a minor child, was the sum of $5,004.98. Assuming that the reasonableness of an award is subject to review in this proceeding, we are not prepared to agree with petitioners that the award as made was for an unreasonable amount. Its amount was within the limit fixed by the statute. We think that there was sustantial evidence to sustain the findings of the commission, and, this being true, it is the duty of the court to affirm the award. Southern Pac. Co. v. Industrial Accident Com'n (Sup.) 170 Pac. 822.

The award is affirmed.

We concur: Conrey, P. J.; Myers, Judge pro tem.

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SUPREME COURT OF COLORADO.

ARKANSAS VALLEY RY., LIGHT & POWER CO.

v.

BALLINGER. (No. 9261.)*

1. MASTER AND SERVANT—ELECTION TO TAKE UNDER WORKMEN'S COMPENSATION LAW — PLEADING AND PROOF.

Where defendant did not plead that either deceased or his employer were subject to the Workmen's Compensation Law, the court did not err in refusing to allow defendant to introduce testimony in support of defense that plaintiff, deceased's wife, had filed her claim for compensation with the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

Error to District Court, Teller County; John W. Sheafor, Judge.

Action by Iola Ballinger against the Arkansas Valley Railway, Light & Power Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

William J. Miles, of Denver, for plaintiff in error.
Frank J. Hangs, of Cripple Creek, for defendant in error.

SCOTT, J. This an action by defendant in error, plaintiff below, to recover damages on account of the death of her husband, alleged to have been caused by the negligence of the defendant power company.

The defendant company was engaged in supplying electric power and machinery to its patrons in the Cripple Creek mining district. In this case it had employed the Colorado Trading & Transfer Company, then engaged in the business, among other things, of moving machinery and materials in and about the district, to move two electric transformers, then located at its Los Angeles distributing station to another point.

One Yates was in charge of the trading company's work of handling and moving heavy machinery, and, working with and under the direction of Yates, the plaintiff's husband was employed. These men proceeded with teams to the distributing station for the purpose of moving the transformers. At the time, Mr. Nevatt who had charge of the station for the defendant was absent. He lived, however, with his family in a part of the building. Yates asked Mrs. Nevatt which of the transformers was to be moved. She thereupon called her husband over the telephone, who advised her, and which information she conveyed to Yates. Yates and Ballinger then proceeded to place the transformer on a truck operated on a track and for that purpose, and moved the truck with the transformer toward the door. The men then discovered that the transformer would not go under the door, this being a door that was raised and lowered by means of a cable and pulley. Yates then asked Mrs. Nevatt to advise her husband of this fact and for instructions in the premises. Nevatt then instructed that the door be removed, and testifies that he ordered it removed south and placed south of the doorway.

In the meantime an employee of defendant, relative of Mrs. Nevatt, and apparently employed about the premises, advised Yates of the location of a lightning arrester and that, it was made to carry the main

*Decision rendered, Jan. 6, 1919. 178 Pac. Rep. 566.

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current of electricity and asked them to be careful to guard against contact with it. This man afterward and before the accident turned on the current in the arrester, which seemed to make so much noise and cause so many sparks as to frighten Ballinger, who was unused to electrical machinery. Yates and Ballinger poceeded to move the door toward the north, but, after moving it some distance, were unable to proceed for the reason that the cable which had been spliced at the point would not go through the pulley. Yates then found that it would be necessary to remove the clevice from the pulley in order for the cable to pass over it. He discovered that there were two electric wires running above the pulley and asked of the watchman as to whether or not they were charged, and who advised him that they were not, but were "dead" wires.

He then secured a ladder and instructed Ballinger to go upon it and release the clevice. This Ballinger did and with a monkey-wrench undertook to turn the nut on the bolt holding the clevice. In doing this the wrench slipped from the nut, striking one of the two wires which was in fact charged with electricity, Ballinger thereby receiving the current, from the effect of which he lost control of his muscles and sank or fell on the arrester, where he received the shock that finally caused his death.

It appears that the wire which was so struck by the wrench was bare, or not insulated, for a space of about two inches at that point. The door was covered on both sides with sheet iron, and the testimony is that, if Ballinger had one hand on the door, this would create a short circuit causing the current to pass through his body.

Verdict and judgment was rendered for the plaintiff.

[1, 2] The plaintiff in error contends that the court erred in refusing to permit it to introduce testimony in support of its defense alleging that the plaintiff had filed her claim for compensation with the Industrial Commission under the Workmen's Compensation Law, and that thereby, and by operation of law, she had assigned whatever right or cause of action she may have had against the defendant on account of the death of her husband, and is not now the owner of said claim.

The court permitted such testimony in the absence of the jury, but excluded the same from the jury.

The defendant did not plead that either Ballinger or his employer, the Colorado Trading & Transfer Company, were at the time subject to the provisions of the Workmen's Compensation Law (Laws 1915, c. 179), which is a necessary prerequisite to recovery under that law, and for such reason alone the testimony was properly excluded.

But the testimony offered shows that the plaintiff did not make any such application. What she did was to write the commission a letter stating the fact of the accident and death of her husband and that she would apply for compensation. The commission replied to this letter inclosing an application blank, but nothing further was done. This cannot constitute an election under the law, even though the parties had been subject to its provisions, which does not appear either from the pleadings or proof offered.

[3] It is further contended that the court erred in giving the jury instruction No. 10, over the objection of defendant, as follows:

"You are instructed that the defendant was bound to exercise the highest skill, most consummate care and caution, and the utmost diligence and foresight in the maintenance and timely inspection of its electrical plant which was attainable consistent with the practical conduct of its business, according to the best-known methods of the said business at and prior to the time of the accident in question, to protect all persons from injury."

It is urged that the defendant in this case may be charged with the exercise of ordinary care only.

The substance of this instruction has been approved by this court

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in Denver Electric Co. v. Simpson, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566, Denver Con. Elec Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39, and Colo. Springs Elec. Co. v. Soper, 38 Colo. 126, 88 Pac. 161, and may be regarded as the well-settled law in this state in such cases.

The defendant undertakes to distinguish the facts of these cases from those of the case at bar and presents the argument that the care imposed by those cases had reference only to the duty of the company in relation to the safety of the public, outside and away from its power station, while in this case the accident occurred within the four walls of its power room, and toward those who, with full knowledge of the character of the place, enter therein for their own purposes.

As to the latter statement, there is no testimony in the record to indicate that either Yates or Ballinger had special knowledge of electricity or electrical appliances, while there is positive testimony that Ballinger did not. The place was one where defendant received and distributed electric current, where it stored and kept transformers, where there must always be great danger, and where its duty to avoid such danger was at least high, if not greater in degree than could be expected at possibly any other point within its operations. To this place it directed the employer of the deceased to perform a service for it. It was its clear duty to exercise the highest degree of care and to use its utmost degree of caution and foresight, consistent with the practical conduct of its operations there to be transacted, to avoid such an accident as occurred.

This duty applies to any one lawfully engaged upon the premises. The rule is stated in 9 R. C. L. p. 1206, to be:

"This duty of using the necessary skill and prudence to prevent injury to persons coming in contact with their wires is imposed upon electric companies, not only as regards the public generally, but also with respect to any individual engaged in a lawful occupation in a place where he is entitled to be. Such persons are not trespassers or licensees bound to take the premises in the condition in which they find them."

[4] It is further urged in substance that the shock received from the wire above the door was not the proximate cause of the death of Ballinger, but that it occurred by reason of his own negligence in moving the door in the direction of, and hence being near, the arrester so as to fall upon it, when if they had moved the door in the opposite direction he would not have been near the arrester and could not have fallen upon it. The fact is that, but for the wire being defective and charged with electricity contrary to the representation made to the deceased by the watchman in charge, there is no indication that the accident would have occurred at all. There was sufficient proof in this respect to justify the jury in finding that this defective wire so charged was the proximate cause of the accident.

In Birsch v. Citizens' Electric Co., 36 Mont. 574, 93 Pac. 940, a hod-carrier, working on a scaffold near a wall being constructed, slipped and involuntarily threw out his hand, which came in contact with one of defendant's wires heavily charged with electricity, which, as in the case at bar, caused him to fall and to be severely injured by the fall. The court said:

"So far as the injuries received by plaintiff from coming in contact with the wire directly are concerned, we think it is a fair inference from the evidence that the negligence of the defendant was the proximate cause thereof. At least, we are satisfied that it was a matter properly submitted to the jury for its determination. This is the holding of the Supreme Court of Massachusetts in Griffin v. United Electric Light Co., 164 Mass. 492, 49 Am. St. Rep. 477, 41 N. E. 675, 32 L. R. A. 400, a case somewhat similar in its facts. Certainly, it cannot be said that plaintiff's accidental slipping was per se negligence on his part. In this state the law presumes that the plaintiff exercised ordinary care."

In this case it must be assumed that the wire causing the injury was

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insulated as a necessary precaution against injury, and, if the defendant permitted a part of this wire to become and remain without insulation, it failed to exercise the caution which itself regarded as necessary, for it did not know of the defect, it could by the exercise of proper diligence have known of the defective condition.

Besides, the workman before attempting to remove the clevice made particular inquiry of the employee then present, as to whether or not the wire was charged with electricity and was expressly told that it was not.

[5] It is contended that this workman was not authorised to make such a statement for the reason that he was not in fact in charge of the premises by authority. He was an employee of defendant; assumed to speak for it; and in the presence of the deceased and his foreman Yates was exercising control and authority, by turning on the heavy voltage through the arrester. It was for the jury to say whether, in view of all the facts and circumstances, the deceased and his foreman were justified in believing this workman was speaking and acting with knowledge and authority to do so.

[6] We think the question of negligence on the part of defendant, and that of alleged contributory negligence on the part of the deceased, were properly submitted to the jury.

The judgment is affirmed.

Hill, C. J., and Garrigues, J., concur.

SUPREME COURT OF ERRORS OF CONNECTICUT.

CUNNINGHAM

v.

DONOVAN ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Where a coal hauler, engaged on a very hot day in shoveling coal from a wagon at a place where there was no shade, was stricken with a heat or sunstroke, and later died, the injury was one arising out of his employment within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Superior Court, New Haven County; William S. Case, Judge.

Proceedings by Margaret Cunningham, under the Workmen's Compensation Act, to obtain compensation for the death of Robert Cunningham, her husband, opposed by John F. Donovan and others. From a judgment of the Superior Court vacating an award of the compensation commissioner, the applicant appeals. Error, judgment set aside, and cause remanded with direction.

* Decision rendered, Feb. 19, 1919. 105 Atl. Rep. 622.

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Robert Cunningham was employed by the defendant Donovan as a teamster on a coal wagon, and in connection with that service to assist in loading and unloading coal thereon and therefrom. About 9 o'clock in the forenoon of August 1, 1917, he left his employer's yard with a wagon containing two tons of coal for the purpose of making delivery of it at a point about a mile distant. The day was an excessively hot one, as had been several days immediately preceding. Upon his arrival at the place of delivery he rested a few minutes, and then began to shovel out the coal. There was no shade at the point where the wagon was standing, and the direct rays of the sun beat upon him as he worked. Between 10 and 11 o'clock, when he had already shoveled out about half of his load, he was overcome by the heat, got out of the wagon, and laid down upon the grass beside it. After lying there a few minutes he got up, staggered through the next yard, and, after proceeding a few hundred feet, collapsed, striken with a heat or sunstroke. Later in the same day he died therefrom.

Heatstroke or sunstroke, as it is also called, is caused by a disturbance of the portion of the brain controlling the regulation of heat in the human body. Cunningham's employment did not expose him in a substantially greater degree to heat and the effects of the sun than that to which others in the same employment were exposed, and did not expose him in a greater degree than many other out-of-door workers were exposed. His exposure in his employment was, however, far greater than the exposure of the community, and the risk to him from heat and the effects of the sun were substantially greater than that of the community.

Thomas P. Dunne and Arthur B. O'Brien, both of Meriden, for appellant.

Philip Pond and William H. Hitchings, both of New Haven, for appellees.

PRENTICE, C. J. (after stating the facts as above). Upon the hearing before the commissioner two controlling inquiries were presented upon both of which the defendants contended for a negative reply, to wit: (1) Did the deceased, in succumbing to a heat or sunstroke, suffer a personal injury within the meaning of our Workmen's Compensation Act (Pub. Acts 1913, c. 138); and (2), if so, did that injury arise out of his employment?

Before us defendant's counsel abandoned their contention as to the first of these inquiries, and conceded that under our recent decision in Ahern v. Spier, 93 Conn. ——, 105 Atl. 340, the commissioner was not in error in his conclusion that the deceased received a personal injury within the meaning of the statute. Their second claim, that the injury did not arise out of his employment, which the court below susatined, was, however, strenuously pursued.

The principles applicable in determining whether or not an employee's injury is to be regarded as arising out of his employment were fully discussed and declared in Larke v. Hancock Mutual Life Ins. Co., 90 Conn. 103, 97 Atl. 320, L. R. A. 1916E, 584. There, speaking generally, we said that:

"If the nature of the employment, or the conditions under which it was pursued, or the exposure to injury it entails, or the doing of something incidental to the employment, was a proximate cause of an injury, it arises out of the employment." 90 Conn. 309, 97 Atl. 322, L. R. A. 1916E, 584.

Speaking more specifically upon the subject of exposure as a factor in determining whether a resulting injury is to be regarded as arising out of the injured person's employment, we said that the test was to be found in the answer to the inquiry whether or not the employee was

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injured as a result of a greater exposure to the cause of injury than that to which persons generally in that locality were subjected. 90 Conn. 309, 97 Atl. 322, L. R. A. 1916E, 584. In Ahren v. Spier, 93 Conn. ——, 105 Atl. 340, we reiterated the same principle, in substance, when we said that:

"An employment will be the proximate cause of an injury when it is the natural and necessary incident of the employment or when the employment brings with it greater exposure to injurious results than those to which persons generally in that locality are exposed, and such injurious result occurs in the course of that employment."

The commissioner's finding in the present case is that the deceased's exposure was far greater than that of the community generally, and the risk from heat and the effects of the sun substantially greater than that of the community. Applying the prescribed test to these facts as found, the right of the claimant to receive an award of compensation is established if the finding is to stand.

The reasons why it should not stand are not apparent to us. Conditions indicative of the deceased's special exposure to risk from the effects of the sun and heat are not, to be sure, as pronounced as they are in the case of the heat victim in Ahern v. Spier, 93 Conn. ——, 105 Atl. 340. But the subordinate facts found plainly disclose the existence of such conditions. Cunningham, at the time he was overcome, was engaged in shoveling coal, a task alike strenuous and well calculated to aggravate the normal effects of a superheated atmosphere and the rays of a hot sun. He was shoveling coal from a wagon which, presumably from its use, was blackened with coal dust, and therefore especially attractive of the sun's rays. As he was shoveling he necessarily disturbed the coal, thus presumably discharging into the air he breathed more or less dust. It is apparent, therefore, that his employment differentiated his exposure to physical harm from that to which the members of the community generally were exposed. The peril which he faced was made up, not merely of the conditions produced by the heat and the rays of the sun beating down upon him, but of those conditions, plus those other aggravating ones which attended the work which he was doing in the pursuit of his employment.

There is error, the judgment of the court setting aside the commissioner's award is set aside, and the cause remanded for the rendition of a judgment affirming the award of the commissioner.

The other Judges concurred.

SUPREME COURT OF ERRORS OF CONNECTICUT.

RICCIO

v.

MONTANO ET AL.*

3 MASTER AND SERVANT—WORKMEN'S COMPENSATION—ADMISSIONS—CONSIDERATION BY COMMISSIONER.

Statements of adjuster, who appeared before workmen's compensation commissioner as representative of both employer and insurer, to obtain, as prescribed by Pub. Acts 1913, c. 138, § 22, as amended by Pub Acts 1915, c. 288, § 14, approval of voluntary compensation agreement, to the effect that deceased had been struck on the face with a board or plank,

* Decision rendered, Feb. 19, 1919. 105 Atl. Rep. 625.

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was properly considered by the commissioner in making his finding and award, in view of Workmen's Compensation Act, § 25.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

Appeal from Superior Court, Hartford County; Lucien F. Burpee, Judge.

Proceeding for compensation by Maddalena M. Riccio against Antonio Montano and another. Award of compensation commissioner in favor of claimant was set aside by the superior court, and claimant appeals. Error, and judgment setting aside commissioners' award set aside, and cause remanded, for rendition of judgment affirming the award.

The commissioner's finding is to the following effect: Antonio Riccio, the claimant's husband, was employed by the defendant Montano. While so employed there had been, for two or three days prior to February 1, 1917, and on that day there continued to be, some pimples on his cheek. On that day he was hit upon these pimples by a board or plank used in concrete construction. As a result of this blow an infection of a virulent form appeared on and about the injured part, such as would have not appeared in the absence of an injury. The infection increased until two days later, when a physician was called. February 6th the patient was removed to a hospital, and on the following day he died. The immediate cause of death was pneumonia, which in turn was induced by the blow and the resulting infection or physical weakness, between which blow and the death there was an unbroken chain of causation and effect.

With his finding and award the commissioner filed a memorandum, made a part thereof, in which he stated that the only real doubt he entertained in the case was whether or not Riccio sustained the injury claimed and found, but that he was of the opinion that the statement of one Pfanensmith, the adjuster of the insurer defendant, made to him at a preliminary conference, established that fact. The occasion referred to was one when counsel for the claimant and Pfanensmith, representing both the insurer and the employer defendant, appeared before the commissioner to obtain, as prescribed by section 22 of Chapter 138 of the Public Acts of 1913, as amended by section 14 of chapter 288 of the Public Acts of 1915, his approval of the voluntary agreement which the parties had entered into. At that time, in the presentation of the situation to the commissioner for his official action, Pfanensmith, in elaborating the statement made by claimant's counsel, told the commissioner, among other things, that the deceased had on January 1st been struck on his face by a board or plank, opening up one of the pimples, which had already formed a scab and a pus deposit. Upon the conclusion of the statements of the representatives of the parties, the commissioner decided that he ought not to approve of the agreement made, and that the case was one which it was his duty to hear. Such hearing was later had, evidence presented by the parties heard, and the award appealed from made.

The appeal to the superior court was based upon two grounds, to wit: (1) That the commissioner erred in finding that Riccio received an injury by being struck in the face by a board or plank; and (2) that he erred in finding that there was a causal connection between such injury and Riccio's death. The particular irregularity charged in support of the defendants' contention that the commissioner erred in reaching his conclusion that the deceased was injured as stated consisted of his having taken cognizance of Pfanensmith's statement above recited, and in forming his conclusion in part at least upon it. The court found that this complaint was well founded, and set aside the award for that cause alone.

Ralph O. Wells, of Hartford, for appellant.
Edward W. Broder, of Hartford, for appellee.

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PRENTICE, C. J. (after stating the facts as above). The commissioner's finding of the vital fact that Riccio received an injury by being struck in the face by a board or plank would find, in the evidence adduced at the hearing held by him following his disapproval of the voluntary agreement, sufficient support to place it beyond the reach of successful attack, did the record stop there. It, however, contains a memorandum by the commissioner, filed with and made a part of his finding and award, which shows that in arriving at his conclusion upon that feature of the case he relied, in part, at least, if not chiefly, upon a statement or admission of Pfanensmith made upon the occasion when the parties, through their representatives, appeared before the commissioner, as the law required, to secure his approval of the voluntary agreement which they had made. The information thus conveyed by the memorandum rendered it incumbent upon the superior court, upon the appeal to it, to inquire whether or not the commissioner, in making his finding and award, was justified in taking cognizance of Pfanensmith's statement, and for us on this appeal to determine whether or not it acted correctly in answering that inquiry in the negative, and in consequence setting aside the commissioner's award.

The reasons urged in support of the court's action in ruling that the commissioner was in error in making a finding based either in whole or in part upon Pfanensmith's statement are three, to wit: (1) That Pfanensmith was without authority to speak in a way to bind the defendants; (2) that his statement, having had for its sole purpose the compromise of a disputed claim, was incompetent; and (3) that the statement, made when and where it was, was not properly before the commissioner as a matter to be considered by him in making his finding and award, or at any stage of the compensation proceedings subsequent to that at which it was made.

[1] The first of these reasons is not well founded. The record shows that Pfanensmith was the insurer defendant's adjuster, and that he appeared before the commissioner as the representative of both the defendants to obtain his official sanction to a voluntary agreement of the parties in interest upon the subject of compensation. Whether or not he was an attorney at law, he was entitled to represent the defendants before the commissioner (section 25 of the Compensation Act), and his statement and admissions as such representative were as much those of his principals, and as binding upon them, as those of an attorney would have been. Representation by a person authorized to practice in our courts would not have given that representative any higher standing as an agent of the defendants authorized to bind them by his words or action.

[2] The objection that the statement was improperly considered, since it was made in furtherance of a compromise settlement, represents a misconception of the scope of the rule in that regard.

"It is never the intendment of the law to shut out the truth, but to repel any inference, which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made because, it is a fact, the evidence to prove it is competent, whatever motive may have prompted the declaration." Hartford Bridge Co. v. Granger, 4 Conn. 142, 148.

"Proposals made while a compromise is in treaty between the parties cannot be offered in evidence, but conversations in which an independent fact is disclosed may be admitted to prove it." Broschart v. Tuttle, 59 Conn. 1, 23, 21 Atl. 925, 931 (11 L. R. A. 33).

Pfanensmith's statement, in the nature of an admission, was made as one of fact. It was made unqualifiedly and without reservation, and as embodying facts which should influence the commissioner's action.

[3] The claim that the commissioner had no right to consider admissions of fact which may have been made upon the occasion of the first appearance of the parties or their representatives before him is one which

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is unmindful of the jurisdiction conferred upon compensation commissioners under our law, the peculiar nature of their functions, only quasi judicial, the scope of their powers and duties, and the informal character of their procedure differentiating it from that in civil actions, and relieving it in large measure from conformity to the more technical rules applicable to them.

Under the law the commissioner was given full jurisdiction to determine what compensation should be made by Riccio's employer on account of his death from injuries received while engaged in that employment, to whom it should be made, what its amount and terms within statutory limitations should be, and whether it should be made in accordance with a voluntary agreement or pursuant to his direct order made after the hearing. The matter in its entirety and in all its aspects was essentially a single one, committed by the law to him for his determination, and formed in effect one cause. It mattered not whether it was before him for approval of the voluntary agreement under section 22 of the act, or for an independent investigation and decision, after a hearing of such evidence as the parties might care to present, as provided in subsequent sections, or in the course of events for both purposes. In either case it was there for his consideration in some phase of a single inquiry and for a single ultimate determination that he was to reach. Accordingly any material fact that came to his official knowledge in his disposition of the matter was one that he was entitled to utilize in any stage of the proceedings which might be had before him to that end, and in the determination of his ultimate official action.

The right of the commissioner to make use of Pfanensmith's statement is further established by the provisions of section 25 of the act, wherein it is provided that commissioners shall not be bound by the ordinary common-law or statutory rules of evidence or procedure, but may make inquiry in such manner through oral testimony or written and printed records as shall be best calculated to ascertain the substantial rights of the parties and carry out justly the spirit of the act. Here is statutory authority fully justifying the commissioner in taking cognizance of Pfanensmith's statement that the deceased was struck in the manner found, clearly and distinctly made to him for his guidance in the performance of his official duty.

Counsel for the defendants in their brief present the further contention that, even if the court erred in setting aside the award for the cause stated in its memorandum, its action was nevertheless correct, in view of the other ground contained in the reasons of appeal, and not passed upon by the court, to wit, that the commissioner erred in finding that there was a causal connection between the blow upon Riccio's face and his death. It is unnecessary to dwell upon this claim further than to observe that the commissioner's conclusion in this regard finds a reasonable foundation for it in the medical testimony presented, and must therefore stand.

There is error, the judgment of the court setting aside the commissioners' award is set aside, and the cause remanded for the rendition of a judgment affirming the award of the commissioner.

The other judges concurred.

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SUPREME COURT OF ILLINOIS.

CHICAGO STEEL FOUNDRY CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12286.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS.

If there is in the record any competent evidence upon which the finding of the Industrial Commission can be based, the Supreme Court will not weigh the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE.

In such case, *held* that there was competent evidence tending to sustain the finding that the injury arose out of and in the course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS.

An objection that an employee, who was awarded additional compensation by the arbitrator for a minor operation found necessary because first operation was not wholly successful, forfeited his right to compensation, or some part thereof, by refusal to submit to a second operation is waived by a failure to assign it as a ground for review before the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding by Albert Schultz for compensation under the Workmen's Compensation Act against the Chicago Steel Foundry Company, employer. The Industrial Commission made an award in favor of claimant, and, the award being affirmed on certiorari brought by the employer against the Industrial Commission, the employer brings error. Affirmed.

MacChesney, Becker, Angerstein & Rollo, of Chicago (Nathan William MacChesney, Thomas C. Angerstein, and George W. Angerstein, all of Chicago, of counsel), for plaintiff in error.

Charles W. Lamborn and John A. Ulrich, both of Chicago, for defendant in error.

STONE, J. The circuit court of Cook county affirmed the award of the Industrial Commission in favor of the defendant in error, Albert Schultz, for injuries received by him while in the employment of plaintiff in error.

[1] Plaintiff in error contends the judgment is erroneous, on the ground that the finding of the Industrial Commission was based on incompetent and improper evidence and on erroneous legal conclusions, and that there was no competent evidence upon which said finding could be based. The rule is well settled that if there is in the record any competent evidence upon which the finding of the Industrial Commission

* Decision rendered, Feb. 20, 1917. 122 N. E. Rep. 150.

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can be based this court will not weigh the evidence. Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110; Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; Pekin Cooperage Co. v. Industrial Com., 285 Ill. 31, 120 N. E. 530.

[2] It is contended by plaintiff in error that the injury did not arise out of and in the course of the employment of defendant in error. Schultz, who was employed to do general carpenter work in and about the plant and yard of the plaintiff in error, was injured while assisting in the carrying of railroad iron to be used in the construction of a switch track in the yards of the plaintiff in error, which track was the property of and being installed by the plaintiff in error. Schultz testified that he was directed by the superintendent of plaintiff in error to assist in the work in which he was injured, and was then so engaged by reason of such direction. This testimony is not positively denied by the superintendent, who testified that he did not remember Schultz ever having worked on said track, but that the plaintiff in error occasionally shifted the men about as the necessity arose. Other witnesses, employees of plaintiff in error, testified to the same effect. There was competent evidence in the record fairly tending to sustain the finding of the Industrial Commission that the injury arose out of and in the course of the employment of the defendant in error.

[3] It appears that a hernia developed from the injury in question. Schultz was operated on for this hernia on August 15, 1916, remaining in the hospital till September 5th, by which time the wound of the operation appeared to have healed. There remained, however, a soreness in the region of the hernia which at times was accompanied by vomiting. Schultz was again placed in the hospital on February 14, 1917, for observation, remaining there until February 25th after which time he was reported by the doctors in charge to have recovered with the exception of the pain in the region of the hernia, which they found due to an adhesion of a nerve to the scar tissue. They also reported that such would be relieved by a minor operation dissecting out said nerve from this scar tissue, which would require 4 additional weeks for healing. The arbitrator made an award of 24 weeks' temporary total disability, 4 weeks of which was for the proposed operation to relieve the nerve referred to. Plaintiff in error agreed before the arbitrator that if there was any liability for compensation the plaintiff in error would provide for this last-named operation. That operation was not performed. Plaintiff in error filed its petition for review with the Industrial Commission, the sole ground assigned in the petition being that the award was contrary to the law and evidence. There was no assignment as ground for review before the Industrial Commission that defendant in error refused to submit to the second operation. The Industrial Commission set aside the finding of the arbitrator, and on the evidence taken before the arbitrator and by the Industrial Commission on review made an award of 68 weeks for temporary total disability. No finding was made by the Industrial Commission as to whether or not the defendant in error refused to submit to the second operation or that such a refusal would be unreasonable. It is here urged for the first time that the defendant in error forfeited his right to said compensation, or some part thereof, by his refusal to submit to the second operation. This objection is one that might be waived by failure to assign it as ground for review before the Industrial Commission, and must be held to have been so waived. It is therefore too late to raise it now for the first time. Stoors v. Industrial Com., 285 Ill. 595, 121 N. E. 267; Chicago Packing Co. v. Industrial Board, 282 Ill. 497, 118 N. E. 727; American Milling Co. v. Industrial Board, 279 Ill. 560, 117 N. E. 147.

The circuit court did not err in affirming the finding of the Industrial Commission and in entering judgment on the award, and its judgment will be affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

CITY OF ROCK ISLAND

v.

INDUSTRIAL COMMISSION OF ILLINOIS ET AL. (No. 12290.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"ORDINANCES."

In a proceeding by a street sweeper for compensation for injuries received when run down by an automobile, city traffic ordinances are not "ordinances" within the Workmen's Compensation Act, § 3, par. (b), division 8, and liability cannot be predicated on the ground that the employment was one in which municipal ordinances were imposed for protection of employees and the public.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Ordinance.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"EMPLOYERS"—CITIES.

Cities and incorporated villages are "employers" within the meaning and intent of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employer.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"STRUCTURE"—"REPAIRING OR MAINTAINING."

A city street paved with asphalt is a "structure" within Workmen's Compensation Act, § 3, par. (b), div. 1, and the sweeping and cleaning of such a street is "repairing or maintaining" the structure within the section, for the presence of rubbish may cause the street to be unsuitable for travel; hence a proceeding by a street sweeper struck by an automobile falls within such section (citing 3 Words and Phrases, Second Series, 211.)

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Structure.)

Error to Circuit Court, Rock Island County; Frank D. Ramsay, Judge.

Proceedings by Hugh McGee for compensation under the Workmen's Compensation Act, opposed by the City of Rock Island, employer. A writ of certiorari issued to review the finding and decision of the Industrial Commission which was awarded compensation was quashed, and the city brings error. Affirmed.

John K. Scott, of Rock Island, for plaintiff in error.
James F. Murphy, of Rock Island, for defendant in error.

DUNCAN, C. J. This writ of error was sued out to review the judgment of the circuit court of Rock Island county quashing a writ of certiorari issued out of that court to review the finding and decision of

*Decision rendered, Feb. 20, 1919. 122 N. E. Rep 82.

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the Industrial Commission. The hearing before the arbitrator resulted in an award in favor of defendant in error, Hugh McGee, against plaintiff in error, the city of Rock Island, for the sum of $395.10 for compensation accrued at the time of the hearing, $48 for first aid, medical, surgical, and hospital services, and $6.30 per week for a total period of 416 weeks, and, if living at the expiration of that time, the further sum of $17.47 per month during the remainder of his life. The Industrial Commission, on review, confirmed the award, and the circuit court sustained the decision of the commission and granted a certificate that the case is one proper to be reviewed by this court.

The facts are undisputed and are as follows: Defendant in error was engaged in street sweeping for the city of Rock Island. His work was on a paved street in said city, and while engaged therein he was run over by an automobile driven by a private individual, from which he rereived injuries to his right hip, as a result of which the hip became stiff, the injury permanent, and defendant in error totally and permanently incapacitated. At the time of the injury there were in force in said city certain ordinances regulating the use of the streets and the speed thereon of automobiles and other vehicles.

[1] Defendant in error justifies the award on the ground that the enterprise or work in which he was engaged at the time of his injury, and out of and in the course of which his injury arose, was extrahazardous. It is insisted that the employment was extrahazardous under the provisions of the Workmen's Compensation Act (Laws 1913, p. 335) concerning "maintaining a structure," and one in which statutory or municipal ordinance regulations are imposed for the protection of employees and the public. Plaintiff in error insists that neither section of the act applies to the facts in this case, for the reason that the improved street was not a "structure" within the meaning of the statute, and that the ordinance regulations governing traffic and speed on the streets are not such regulations as are contemplated in division 8 of paragraph (b) of section 3 of said act.

Speed and traffic ordinances are not such regulations as are within the contemplation of division 8 of paragraph (b) of section 3 of the Workmen's Compensation Act. The statutory or municipal ordinance regulations referred to in division 8 must be such laws or ordinances as are enacted or imposed with reference to the employment. The city ordinances of the city of Rock Island enacted for the purpose of regulating traffic and speed of automobiles upon its streets apply generally to every person using the public thoroughfares of the city and are designed for the protection of all persons using such public thoroughfares. They have no reference to the subject-matter with which said section of the Workmen's Compensation Act is concerned, and the city is not liable in this case by reason of any of the provisions in said division 8 of paragraph (b). Dietrich v. Industrial Board (No. 12300) 121 N. E. 226.

[2] Cities and incorporated villages are "employers" within the meaning and intent of the Workmen's Compensation Act, Marshall v. City of Pekin, 276 Ill. 187, 114 N. E. 497.

[3, 4] This court has held that, when a public corporation is engaged in building an ordinary dirt road, it is not engaged in an extrahazardous enterprise. The occupation of constructing permanent roads whereon cement mixtures are formed and placed and where rock is crushed and placed thereon may be regarded as a dangerous occupation. The maintaining and repairing of such public roads or of public streets in cities are the maintaining and repairing of a "structure" within the meaning of division 1 of paragraph (b) of section 3 aforesaid, when the maintaining and repairing of the same are, in fact, extrahazardous. McLaughlin v. Industrial Board, 281 Ill. 100, 117 N. E. 819. The improved street in question in this case was an asphalt street, and defendant in error was engaged in cleaning and sweeping that street. His

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occupation of sweeping and cleaning the street was a dangerous occupation, if at all, only by reason of the further fact that the occupation subjected him to the dangers of being injured by passing automobiles or other vehicles for travel or traffic. It cannot be gainsaid that the defendant in error was subjected to dangers of being injured by such passing autombiles or other vehicles. The character of the street upon which defendant in error was performing his work subjected him to greater hazards than of the same had been a common dirt street because of the fact that such paved streets are so constructed as to permit travel on the whole width of the street that is paved. The street in question being in a city, we may take judicial notice of the fact that there is very much more travel on the street than there would be on a common dirt road in the country, and that the dangers to defendant in error from passing vehicles while sweeping and cleaning the street were very much greater than would be the danger to one working upon a dirt road in the country. Therefore the finding of the Industrial Commission that he was engaged in an extrahazardous occupation cannot be said not to have been supported by the evidence in this case.

An improved street must be held to be a "structure" within the meaning of the Workmen's Compensation Act.

"The sweeping and cleaning of streets is 'repairing' or 'maintaining' them, * * * for the presence of rubbish dirt, and ashes in a street may cause it to be in a bad state of repair and in an unsuitable condition for travel, and any act that is reasonably necessary to put or keep the street in good repair suitable for travel thereon is 'repairing' or 'maintaining' the street." 3 Words and Phrases, Second Series, 211.

This court held in Chicago Cleaning Co. v. Industrial Board, 283 Ill. 177, 118 N. E. 989, that the business of washing and cleaning windows is a hazardous occupation intended to be included in the enumeration in the Workmen's Compensation Act of such occupations as relate to the maintenance of buildings. We therefore hold that plaintiff in error was engaged in the business or occupation of maintaining a structure, within the meaning of division 1 of paragraph (b) of said section 3.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

MARK MFG. Co.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12311.)*

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—"TOTAL LOSS OF USE OF HAND."

Employee, who had previously lost part of one finger, but nevertheless had use of hand, who, as result of later injury, not resulting in total severance, totally lost use of hand, *held* entitled to compensation for "total loss of use of hand," though with mechanical appliance on wrist he could perform some manual labor, and though he might have recovered for first injury.

(For other cases, see Master and Servant, Dec. Dig. § 385[6].)

*Decision rendered Feb. 20, 1919. 122 N. E. Rep. 84.

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Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under the Workmen's Compensation Act for compensation for injuries by Frank P. Criner, opposed by the Mark Manufacturing Company, employer. Compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and the employer brings error. Affirmed.

W. J. Weldon, of Chicago, for plaintiff in error.
A. B. Manion, of Chicago, for defendant in error.

DUNN, J. The circuit court of Cook county confirmed an award of the Industrial Commission granting compensation from the Mark Manufacturing Company to Frank P. Criner under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i). The proper certificate having been made, the company has sued out a writ of error, and the only question presented is whether there is evidence in the record justifying the finding that the injury sustained by Criner caused the permanent and complete loss of the use of his left hand.

In the course of Criner's work of juggling pig iron, his left hand was crushed so that the second, third, and fourth fingers were amputated. The index finger was also badly crushed, and there is a scar on the inside of the finger, which has contracted so that the finger is bent inward, is stiff, has very little motion, and is always painful. The palm of the hand became infected and was lanced several times. At the time of the hearing before the commission, eight months after the injury, it was soft, more hollow than the right hand, and there had been some sloughing of the tissues. The thumb was not injured, and can be used in connection with the bent and stiffened index finger and the stump of the second finger to pick up small articles, to assist in dressing, to button a coat, or do similar small acts. Previous to this accident Criner had received another injury, and the second finger of his left hand had been amputated between the first and second joints. A further amputation of one-half inch to three-quarters of an inch resulted from the present injury, leaving about one-fourth of the middle phalanx in position. Three months after the injury Criner returned to work for the plaintiff in error, but his work was of a different character and for less pay. The character of his work is not clearly shown, but he testified that he did it with one hand by resting the handle of a scoop across the wrist of the other arm, using an appliance fastened around the wrist.

The Workmen's Compensation Act provides for the payment of compensation for the loss of a finger or the permanent and complete loss of the use of it, at the rate of 50 per cent. of the average weekly wages, for 35 weeks for the index finger, 30 weeks for the second finger, 20 weeks for the third, and 15 weeks for the fourth; and for the loss of a hand or the permanent and complete loss of its use, 50 per cent. of the average weekly wages for 150 weeks. The award was based upon the permanent and complete loss of the use of the left hand. The contention of the plaintiff in error is that it should have been based upon the loss of the index, third, and fourth fingers, and should not have exceeded 50 per cent. of the average weekly wages for 70 weeks. It is further contended that, even if there was a complete loss of the use of the hand, the previous loss of a part of the second finger would have entitled the defendant in error to an award of 30 weeks' compensation if the Workmen's Compensation Act had been in force at the time of that injury, and therefore the compensation for the present injury should not have extended beyond 120 weeks.

The permanence of the loss of use is apparent, and while the defendant in error is able to perform some acts with his thumb and the remains of his finger, they are not of such a character as to be of any practical value in manual labor—at least there was evidence from which the

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arbitrator and the commission might reasonably have arrived at that conclusion. The fact that by the use of a mechanical appliance or some substitute for the hand the defendant in error is able to perform manual labor to some extent is not inconsistent with the complete loss of the use of the hand for practical work "The incapacity of use need not be tantamount to an actual severance of the hand; it is enough that the normal use * * * has been taken entirely away." In re Meley, 219 Mass. 136, 106 N. E. 559; Floccher v. Fidelity & Deposit Co., 221 Mass. 54, 108 N. E. 1032; Lemieux v. Contarctors' Mutual Liability Ins. Co., 223 Mass. 346, 111 N. E. 782; Rockwell v. Lewis, 168 App. Div. 674, 154 N. Y. Supp 893.

Though the defendant in error had previously lost a part of one finger, he had the use of the hand, with a capacity somewhat reduced by reason of the defect. The fact that his hand was not perfect did not render its loss any less complete. As the result of his injury he has totally lost the use of the hand, which he previously had, and under the statute he is entitled to compensation for that loss. Wabash Railway Co. v. Industrial Com. (No. 12274) 286 Ill. 194, 121 N. E. 569; In re Branconnier, 223 Mass. 273, 111 N. E. 792; Schwab v Emporium Forestry Co., 216 N. Y. 712, 111 N. E. 1099. The fact that he might have recovered for the first injury did not reduce the amount of compensation to which he is entitled for the loss of the use of his hand.

The judgment is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

GONES

v

FISHER. (11956.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES BY THIRD PERSONS — ALTERNATIVE REMEDY.

Under Workmen's Compensation Act, § 29, providing for adjustment of compensation, where an employee, who as well as his employer has elected to come under the act, is injured by a third person, who is not under the act, the employee need not elect between compensation under the act and damages at common law, but may prosecute both actions at the same time.

(For other cases, see Master and Servant, Dec. Dig. § 354.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —INJURIES BY THIRD PERSONS—RIGHT TO PROCEEDS OF JUDGMENT.

Under Workmen's Compensation Act, § 29, providing for adjustment of compensation where the employee is injured by the act of a third person, the employee, after the employer has indemnified himself by suing the third person, is entitled to the entire balance of the judgment recovered if more than sufficient for such indemnification.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

*Decision rendered, Feb. 20, 1919. 122 N. E. Rep. 95.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—RIGHT TO BRING SUIT.

Where an employee is injured by the action of a third person, who is not under the Compensation Act, the employer may sue for the entire damages, either in his own name or in that of his employee, or may continue any suit begun in the name of such employee after his liability is fixed.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PROCEEDS OF JUDGMENT—DISTRIBUTION.

Where an employee under the Workmen's Compensation Act is injured by the negligence of a third person not under the act, and suit is brought either by the employee or the employer, and more than the compensation fixed by the act is recovered, the court may by order distribute the proceeds as between the employee and employer.

(For other cases, see Master and Servant, Dec. Dig. § 389.)

Appeal from Circuit Court, Vermillion County; Walter Brewer, Judge.

Action by C. B. Gones against J. G. Fisher on the case. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Walter T. Gunn and Thomas A. Graham, both of Danville, for appellant.

Ralph M. Jinkins, of Fairmount, and Lindley, Penwell & Lindley, of Danville (Walter C. Lindley, of Danville, of counsel). for appellee.

DUNCAN, C. J. Appellant, C. B. Gones, began this action on the case in the circuit court of Vermillion county against appellee, J. C. Fisher, the Illinois Printing Company, and Newton Shields for damages for personal injuries, charging in his declaration that while he was in the exercise of reasonable care for his own safety he was injured by the negligence of the defendants in operating an automobile. A verdict of $5,000 was recovered by appellant, upon which judgment was entered. On appeal to the Appellate Court of the Third District the judgment was reversed; the court holding that there was no liability against the Illinois Printing Company and Newton Shields, and the cause was remanded for further proceedings against appellee. Upon reinstatement in the circuit court the suit was dismissed as to the defendants the Illinois Printing Company and Newton Shields, and an amended declaration containing practically the same averments against appellee as were in the original declaration was filed against him alone. Appellee filed pleas of the general issue, the statute of limitations, and five special pleas. Afterwards he withdrew the plea of the statute of limitations, and thereupon the court overruled appellant's demurrer to the five special pleas. Appellant elected to stand by his demurrer. The court entered judgment in bar of the action, and the appellant has appealed directly to this court on the ground that the constitutionality of section 29 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 152b) is involved.

Three of the special pleas alleged, in substance, that appellant at the time of his alleged injuries was employed by a copartnership, Schmitt & Leachman; that both appellant and his employer had elected to be bound by the Workmen's Compensation Act and were within its provisions, and that appellee had elected not to be bound by that act; that appellant's injuries occurred in the course of and arose out of his employment, and were not proximately caused by the negligence of his

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employers or their employees; that appellant had agreed to accept, and had accepted from his employers for his injuries, the sum of $1,000 under the Workmen's Compensation Act; that this action is not maintained in appellant's name by his employers, wherefore no cause of action arose against appellee in favor of appellant, and he could not maintain the action, but any action for his alleged injuries could be maintained or continued only by his employers in their name or in the name of the appellant. The other special pleas contained substantially the same averments as the first three special pleas, except that they contained no averments that appellee had or had not elected to come under the Workmen's Compensation Act.

The pleas were based on sections 6 and 29 of the Workmen's Compensation Act (sections 132, 152b), the first of which provides that no common-law or statutory right to recover damages for injury or death sustained by an employee while engaged in the line of his duty as such employee, other than the compensation provided in the act, shall be available to any employee who is covered by the provisions of the act. That section is qualified by section 29, which, so far as is material to this case, reads as follows:

"Where the injury or death for which compensation is payable under this act, was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person having elected not to be bound by this act, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this act, but in such case if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or his personal representative: Provided, that if the injured employee or his personal representative shall agree to receive compensation from the employer or to institute proceedings to recover the same or accept from the employer any payment on account of such compensation, such employer shall be subrogated to all the rights of such employee or personal representative and may maintain, or in case an action has already been instituted, may continue an action either in the name of the employee or personal representative or in his own name against such other person for the recovery of damages to which but for this section the said employee or personal representative would be entitled, but such employer shall nevertheless pay over to the injured employee or personal representative, all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this act, and all costs, attorney's fees and reasonable expenses incurred by such employer in making such collection and enforcing such liability." Hurd's Stat. 1917, p. 1466.

It is contended by the appellant that, if section 29 deprives employees of their right to recover from third parties who are not under the act for injuries caused by their negligence, such a provision is not within the title of the act, as required by section 13 of article 4 of the Constitution, and deprives appellant of his property without due process of law, contrary to the provisions of section 2 of article 2 of the Constitution. Sections 6 and 29 were fully considered in the cases of Keeran v. Peoria, Bloomington & Champaign Traction Co., 277 Ill. 413, 115 N. E. 636, and Friebel v. Chicago City Railway Co., 280 Ill. 76, 117 N. E. 467, in which the same questions as to constitutionality were considered. It was held in substance, after full consideration, that neither an employee,

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his personal representative, nor next of kin has any vested right to recover damages for personal injuries to the employee that the Legislature could not at any time do away with by a public enactment, and that such objections to the validity of the act could not be sustained. In those two cases the employer, the employee, and the third party whose negligence was alleged to have caused injury to the employee were all under the Compensation Act. It was held in those cases that the Compensation Act fixed the utmost measure of liability to the employee, and that the employer was the only party directly liable to the employee, and that the employee could maintain no action whatever in his own name against the party causing his injury. It was further held that the common-law right of the employee to sue for his injury against the party negligently causing his injury was in such a case transferred to his employer, and that the employer could maintain a suit against the party causing the injury by proving such common-law right against such negligent party, but that the amount of such recovery could not exceed the amount that the employer was required to pay his employee under the Compensation Act. In the Friebel Case it was further held that the statute permitted the employer to sue the negilgent party for such damages, where all three of them were under the Compensation Act, as soon as the amount of the compensation for the employee was determined and fixed, whether paid in full by the employer or otherwise. The evident reason for such a provision in the statute was to prevent the running of the statute of limitations against the employer in his suit against the party causing the injury and to preserve to the employer the right to pay the compensation to his employee in installments, extending in many cases through years, as contemplated by other provisions of the Compensation Act. As the right of the employer to sue the party causing the injury in such a case was given for remuneration to the employer for the amount he was compelled to pay his employee for the negligent act of the party whose negligence caused the injury and to enable such employer to pay his injured employee out of the amount so recovered, it was further held in the Friebel Case that such recovery was clearly for the use of the injured employee and in case of insolvency or of the refusal of the employer to sue for such damages it was the right of the injured employee, after his right to compensation was fixed, to sue for such damages in the name of his employer for the employee's use and to so collect the same.

[1-3] By the express provisions of section 29 above quoted, where the person by whose neglect the injury is caused has elected not to be bound by the act, as alleged in three of the pleas now under consideration, the common-law right of action is preserved against him in full. In such case the employee is not put to his election between compensation under the Compensation Act and damages at common law. The common-law action and the claim for statutory compensation may be prosecuted at the same time. Said section does not limit the damages which may be recovered in the action at law to the amount of compensation allowed to the employee, but does provide for the indemnification of the employer out of the amount recovered. After the employer is thus completely indemnified, the employee is entitled to the entire balance of the judgment recovered, if there is a recovery for more than is sufficient for such indemnification The employer is given the right to sue for the entire damages, either in his own name or in the name of the injured employee, or he may continue any suit begun in the name of such employee after his liability for compensation is fixed or paid. The right of action is not otherwise modified by the Compensation Act. The law action in such a case is continued and maintainable for the use of both employer and employee; for both are supposed to be, and are in fact, interested in the judgment. Each party has an actual and enforceable interest in the judgment in cases where it is in excess of indemnity to

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the employer, and each party necessarily would have the right to enforce the collection of the judgment and the payment to himself of the portion thereof legally belonging to him. The party in whom is the legal right of action may bring and maintain a suit, and it is not necessary that the record should show for whose use or benefit the suit is brought. Atkins v. Moore, 82 Ill. 240; Schott v. Youree, 142 Ill. 233, 31 N. E. 591.

[4,5] There is but one legal cause of action, and it is for the common benefit and use of both employer and employee. By the express provisions of said section the suit may be maintained in either the name of the employee or that of the employer. The defendant's defenses, if he has any, are necessarily the same whether he is sued in the name of the employer or of the employee. A suit in the name of the employee, and a judgment therein against the defendant would be a bar to another suit in the name of the employer for the same damages, whether the suit was, in fact, prosecuted and controlled by the employee or by the employer. It must necessarily follow, then, that either the employee or the employer may prosecute such a suit to a final judgment and force the collection of the same. The plaintiff must distribute the proceeds of the judgment between the employer and the employee in the proportion to which each is entitled. The court, on its attention being called thereto by the other party interested in the judgment, would be authorized to make such order as would insure the proper distribution of the judgment, but the division thereof is no concern of the defendant. Payment of the judgment by the defendant, if any should be recovered against him, would completely discharge him from all further liability.

The pleas in question stated no defense to appellant's declaration. The judgment is therefore reversed, and the cause is remanded, with directions to sustain the appellant's demurrer.

Reversed and remanded, with directions.

SUPREME COURT OF ILLINOIS.

MOUSTGAARD

v.

INDUSTRIAL COMMISSION ET AL. (No. 12272.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CLAIM.

The making of a claim for compensation within six months after the accident is esssential to the right to an award.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CLAIM.

A claim for compensation need not be in writing, but may be verbal, and it is sufficient if the employer is informed by it that the employee intends to claim the benefit of the act.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

* Decision rendered, Feb. 20, 1919, 122 N. E. Rep. 49.

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3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CLAIM.

Evidence *held* to show that an injured employee verbally claimed compensation within the six-month period.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE—AWARD.

In a proceeding for compensation under the Workmen's Compensation Act, *held* that an award for a period of 133 weeks of temporary total incapacity for work was warranted.

(For other cases, see Master and Servant, Dec. Dig. § 385[15].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings by Herman Erickson for compensation under the Workmen's Compensation Act against Martin Moustgaard. An award of the Industrial Commission was affirmed by the circuit court, and, it having certified that the cause was one proper to be reviewed, a writ of error was sued out by the employer. Judgment affirmed

Thompson, Tyrell & Chambers, of Chicago, for plaintiff in error.

Vincent D. Wyman and Harry C. Kinne, both of Chicago, and Charles E. Carpenter, of Urbana, for defendant in error.

DUNN, J. The Industrial Commission made an award under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) in favor of Herman Erickson against Martin Moustgaard for a period of 133 weeks of temporary total incapacity for work on the part of Erickson and also for the loss of his leg. The circuit court of Cook county, having confirmed the award, certified that cause was one proper to be reviewed by the Supreme Court, and a writ of error has been sued out to review the judgment.

Two objections are made to the award: First, that claim for compensation was not made within six months after the accident; and, second, that there is no evidence of 133 weeks of temporary total incapacity to work.

The accident happened on a Wednesday in April, 1914, while Erickson, who was working for the plaintiff in error in the construction of a foundation, was wheeling concrete over a runway in a wheelbarrow. A cross-piece under the runway broke, Erickson let go with his right hand, the wheelbarrow tipped, and the handle struck the inside of his right knee. He continued to work that day and the rest of the week, though his knee was swollen and painful, but the next Monday he did not go to work. On that day, which was April 20th, he called upon Dr. Paulson, who treated him occasionally from that time until August, 1915, the injury getting worse, when he told Erickson it was a bone injury, and he must go to the hospital. Erickson was in the Cook county hospital from March, 1916, to October, 1916, and his leg was amputated in May. Subsequent amputations were made in July and September, and he was discharged on October 22, 1916.

[1, 2] The making of a claim for compensation within six months after the accident is essential to the right to an award of compensation under the Workmen's Compensation Act. Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496; Haiselden v. Industrial Board, 275 Ill. 114, 113 N. E. 877. The claim need not be in writing, but may be verbal (Suburban Ice Co. v. Industrial Board, 274 Ill. 630, 113 N. E. 979), and is sufficient if the employer is informed by it that the employee intends to

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claim the benefit of the act (Conway Co. v. Industrial Board, 282 Ill. 313, 118 N. E. 705.

[3, 4] Erickson testified that the plaintiff in error was present when the accident happened, and that the next Monday Erickson went to the job and told the plaintiff in error his leg was so sore that he had to go home, and the plaintiff in error said: "You wasn't hurt on the job; you were drunk and fell over and hurt yourself." Three or four days later he telephoned to Moustgaard that his knee was acting pretty bad, and Moustgaard had better report him sick to the insurance company. Two weeks later he said he went to Moustgaard's house and asked for his compensation because he needed it; he had nothing to live on. Moustgaard was just ready to drive away, and Erickson told him he wanted to know what insurance company he had to go to and get money, because he needed it. Moustgaard told him he did not report to the insurance company and drove off. The plaintiff in error argues that Erickson's statement that he asked for his compensation because he needed it—he had nothing to live on—was a mere conclusion, and that it appears that the statement does not correctly represent what he said, from his immediately stating, on being asked what he said: "I told him I want to know what insurance company I got to go to and get money, because I need it." This objection assumes that the answer in which the language quoted was used was intended as a substitute for the answer to a previous question instead of an expansion of it, as the witnees probably intended. Even apparently simple statements of fact upon analysis will frequently be found to be based upon inferences drawn from other facts which are assumed. The ownership of property, marriage, relationship, and many other conditions, are conclusions dependent upon the existence of facts out of which they arise, and yet they are usually proved by a direct statement of the ultimate conclusion. Such a statement may sometimes be incompetent if objected to, but if received without objection it cannot be disregarded as of no probative force. Whether Erickson asked for compensation depends upon the language he used, but this does not make his statement of the ultimate fact incompetent evidence. It is not destroyed by the statement that he asked about the insurance company, which he probaly supposed would have the compensation to pay.

[5] It is contended that there is no evidence of a temporary total incapacity for 133 weeks. The accident occurred April 15, 1914, and the decision of the arbitrator was rendered February 2, 1917, more than 2 years and 9 months later. Erickson testified that he tried to work several times, but was unable to. From the time he visited Dr. Paulson his knee was sore and swollen. Though it improved temporarily, the pain continued. He could not walk right. Eventually it got much worse, and the amputations which have been mentioned became necessary. Dr. Robertson, a physician at the hospital, testified that he thought Erickson could do light work in 3 or 4 months after his discharge. There was evidence of total incapacity to work for the time for which compensation was awarded.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

MEYER ET AL.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12285.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WAIVER OF OBJECTIONS.

Where a petition for review for recurring disablility was filed with the Industrial Commission about two weeks after lapse of the period fixed for paying compensation under the original award, and the record showed due notice was given of the hearing before the board, and that the employer participated without raising the objection that the notice required by Workmen's Compensation Act, § 24, was not given, *held* that, though such notice was required by section 19, under which the petition was filed, the matter not having been raised before the Industrial Commission, and the employer having submitted to its jurisdiction, it cannot be raised thereafter.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WAIVER OF OBJECTIONS.

Where the employer, on petition for review of an award for recurring disability, did not raise before the Industrial Commission the objection that the claimant was suffering from a continuance of the original disability, and not a recurrence, the objection cannot be raised thereafter.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding by Eugene Poznanski for compensation under the Workmen's Compensation Act against Paul J. Meyer and others. On petition for review of recurring disability, the Industrial Commission made an award in favor of claimant, and, the award having been affirmed on writ of certiorari sued out by Paul J. Meyer and others, the employers, they bring error. Affirmed.

J. C. M. Clow, of Chicago, for plaintiffs in error.

A. H. Ranes and Corinne L. Rice, both of Chicago, for defendant in error.

CARTER, J. This was a proceeding under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i), asking for an award on behalf of defendant in error, Eugene Poznanski, for an injury received while an employee of plaintiffs in error. On a hearing before the arbitrator an award was entered on behalf of Poznanski for "temporary total disability" for 48 weeks at $12 a week, beginning November 22, 1915, when the accident occurred. Half of this had been paid to the applicant before the award was rendered. The last payment was to be, and apparently was, made under this award on October 30, 1916. No petition for review was filed as to this award by either party. It was agreed at this hearing that the parties were operating under the Compensation Act at the date of the accident and that the injury arose out of and in the course of the employment. A petition for review because of recurring

* Decision rendered, Feb. 20, 1919, 122 N. E. Rep. 51.

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disability was filed by the applicant with the Industrial Commission on November 11, 1916. On June 12, 1917, that commission rendered its decision, in which it allowed applicant $12 per week for a further period of 26 weeks, commencing at the termination of the payments allowed by the arbitrator. Thereafter the plaintiffs in error sued out of the circuit court of Cook county a writ of certiorari to review the award of the Industrial Commission. The circuit court affirmed said award and entered judgment in favor of the applicant, the court at the same time certifying that the case was one proper to be reviewed by this court The cause has been brought here by writ of error.

The only questions in dispute here are whether it is shown that a written notice was given of the continuing disability, whether such notice is necessary under the circumstances as shown in this record, or whether the same was waived.

[1] The petition for review for recurring disability was filed with the Industrial Commission about 2 weeks after the lapse of the period fixed for paying compensation under the original award—that is, on November 11, 1916. The time fixed for the hearing on review and taking testimony, March 23, 1917, was less than 6 months subsequent to the discontinuance of payments under the orginal award. Counsel for plaintiffs in error then asked for, or at least acquiesced in, a continuance to a time over 6 months after such last payment without raising any question as to the jurisdiction of the Industrial Commission under the petition for rehearing.

The petition for review was apparently drawn and filed under the provisions of paragraph "h" of section 19 of the Workmen's Compensation Act, and the award of the Industrial Board on this petition for review was apparently made under the provisions of section 24 of said act. Said paragraph "h" of section 19, so far as it applies here, reads:

"An agreement or award under this act, providing for compensation in installments, may at any time within eighteen months after such agreement or award be reviewed by the Industrial Board at the request of either the employer or the employee, on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended: * * * Provided, that the board shall give fifteen days' notice to the parties of the hearing for review." Hurd's Stat. 1917, p. 1462.

No proceedings for a continuance of payments after the date of the final payment under the original award shall be maintained unless in accordance with the provisions of section 24 of said act, which reads in part:

"No proceedings for compensation under this act shall be maintained, * * * in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made, within six months after such payments have ceased."

It is argued that this award was unauthorized because the petition was filed under section 19, and the award was allowed under section 24, without the written notice required under the provisions of section 24. There was no question raised before the Industrial Board as to any variance, nor is there any assignment of error on this question. The record of the board shows that due notice was given of the hearing before that board on March 23, 1917. As there is nothing in the record to show that such notice was not given, and as no question was raised by plaintiffs in error as to this notice on the hearing before the Industrial Board, under the reasoning of this court in Smith-Lohr Coal Co. v. Industrial Board, 279 Ill. 88, 116 N. E. 656, the question as to lack of notice cannot be here raised. The hearing at which counsel for plaintiffs in error appeared and joined in the taking of evidence, on March 23, 1917, was within 6 months after the final payment under the original award and therefore within the 6 months' time limit provided for under section 24 and plaintiffs in error, having submitted to the jurisdiction of the In-

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dustrial Commission and not having raised that question before said commission, cannot raise it here. American Milling Co. v. Industrial Board, 279 Ill. 560, 117 N. E. 147; Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B,627.

[2] The same reasoning and conclusion must also be reached with reference to the rights of plainiffs in error in connection with the argument that the applicant is suffering from a continuance of the original disability and not a recurrence. No question of that kind was raised before the Industrial Commission, and under the authorities just cited it cannot be raised for the first time in the courts.

The judgment of the circuit court will be affirmed.

Judgment affirmed

SUPREME COURT OF ILLINOIS.

H W. NELSON R. CONST. CO.

v.

INDUSTRIAL COMMISSION OF ILLINOIS ET AL. (No. 12316.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY WHILE GOING TO LUNCH—"ARISING OUT OF AND IN COURSE OF EMPLOMENT."

Employee's act in going to lunch is an incident of his employment, though dinner hour is not paid for by employer, and injury during such business arises out of and in course of employment; rule not applying where employee chooses to go to a dangerous place where employment does not necessarily carry him.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

(For other definitions, see Words and Pharses, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COURSE OF EMPLOYMENT—BURDEN OF PROOF.

In proceedings under Workmen's Compensation Act against employer for death of employee, burden rested on administratrix to prove that injury from which death occurred arose out of and in course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—BURDEN ON ADMINISTRATRIX.

Where injury resulting in death of employee occurred during his noon hour while he was crossing bridge to secure lunch, administratix, proceeding under Compensation Act had burden to establish facts that employee was using way which he had right to use, and which was only available way. or as safe as any other.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

* Decision rendered, Feb. 20, 1919. 122 N. E. Rep. 113.

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4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE—NECESSITY OF MOTION TO EXCLUDE.

Plaintiff in error cannot complain of incompetency of evidence, first excluded by workmen's compensation arbitrator on her objection, who subsequently brought it out herself on cross-examination of the witness without any objection and without even having made motion to exclude.

(For other cases, see Master and Servant, Dec. Dig § 417[4].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COURSE OF EMPLOYMENT—VIOLATION OF INSTRUCTION.

Where deceased servant, by crossing bridge under construction to get his lunch, was violating instruction of employer given by superintendent in charge of work, when accident which caused his death occurred, injury did not arise out of and in course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

Error to Circuit, Winnebago County; Robert K. Welsh, Judge.

Proceedings under the Workmen's Compensation Act for compensation for the death of Hugh H. McGhan, by Laura B. McGhan, administratrix, opposed by the H. W. Nelson Railroad Construction Company, the employer. Compensation was awarded by the Industrial Commission, and the record of proceedings before it quashed and award set aside on certiorari, and from the judgment the administratrix prosecutes error. Affirmed.

Hyer & Gill, of Rockford, for plaintiff in error.
E. M. St. John, of Rockford, for defendant in error.

DUNCAN, C. J. A writ of certiorari having been sued out of the circuit court of Winnebago county to review the decision of the Industrial Commission awarding compensation to plaintiff in error, Laura B. McGhan, administratrix of the estate of her father, Hugh H. McGhan, deceased, the court quashed the record of the proceedings before the commission and set aside the award. From that judgment this writ of error was prosecuted, the trial judge having certified that this cause is one proper to be reviewed.

Defendant in error, the H. W. Nelson Railroad Construction Company, on October 11, 1915, was engaged in construction work on a railroad bridge of the Illinois Central Railroad Company which crossed the Rock river at Rockford The bridge carried a single railroad track, upon which the Illinois Central trains passed back and forth at frequent intervals. No footpath for pedestrains on said bridge was provided. On that date Hugh McGhan was going across that bridge from the east side of Rock river, where he had been at work for defendant in error as a stationary engineer, to the west side of said river for the purpose of eating his lunch, having left his dinner pail on that side of the river. As he was crossing the bridge during the noon hour intermission he was struck by an Illinois Central train and knocked into the river. He attempted to avoid being hit by the train by crawling out onto the ends of the ties. He was struck by the engine on the head, was taken from the river some distance downstream and carried to a hospital, where he was given a prophylactic treatment for typhoid because of the river water he had taken into his system. He remained in the hospital about four days and was then taken to his home. About the tenth day after his injury he became weak, and a few days later he suffered urinary trouble. An analysis of his urine showed the presence of sugar, and the diagnosis disclosed diabetes. There is no dispute as to the fact that he suffered

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traumatic diabetes, which was directly due to his accidental injury, and from which he died September 14, 1916.

It is agreed that both defendant in error and McGhan were subject to the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) at the time of the accidental injury to the deceased; that his compensation was $2 per day, based on a 200 working day year; and that plaintiff in error was appointed administratrix of his estate. The dispute in the case is as to whether the injury arose out of and in the course of his employment. The circuit court set aside the award on the ground that there is no evidence in the record tending to support the finding of the commission that the injury from which the deceased died arose out of and in the course of his employment.

[1] The general rule announced in both English and American decisions is that going to lunch by an employee is an incident of his employment; that the dinner hour although not paid for by the employer, is included in the time of employment; that a temporary absence from the place of employment for the purpose of procuring food does not suspend the employment; that an injury occurring during such a temporary absence arises out of and in the course of such employment; and that it makes no difference that the injury occurred off the premises of the employer if the employee was using premises which he had a right to use and which provided the only available way to reach the point to which he was going for lunch. In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, and footnote thereto, in which a large number of authorities are collated. In the case of Milwaukee Western Fuel Co. v. Industrial Com., 159 Wis. 635, 150 N. W. 998, it was held that an injury arose out of and in the course of the employment where the employee was drowned during the noon hour. In that case he partook of his lunch on the employer's premises, as was customary in the conduct of the employer's business. He then walked from his lunching place to the bank of the river, and thence along a passageway between his employer's building and the river's edge, going towards a toilet used by employees. Before he arrived at the toilet he accidentally fell in the river and drowned. This general rule does not apply where an employee chooses to go to a dangerous place where his employment does not necessarily carry him, and where he incurs a danger of his own choosing and one altogether outside any reasonable exercise of his employment. Northern Illinois Light & Traction Co. v. Industrial Board, 279 Ill. 565, 117 N. E. 95. It does not apply where an employee contrary to the previous usage and custom, leaves his place of employment and his fellow workmen to go elsewhere on a mission of his own, not connected with his employer's business, but merely for his own pleasure. Thus, a workman who failed to bring his dinner with him, as was customary with the crew and as he had always done before, was held not injured in the course of his employment, and that his injury did not arise out of his employment where he was struck by a railroad train while walking along the track. Hills v. Blair, 182 Mich. 20, 148 N. W. 243.

[2, 3] In this case there was a showing in the record that the employees of the defendant in error who were working at construction work on the bridge in question went from their work across the bridge for lunch and for other purposes. It is apparent that this was a matter of necessity, as they could not get off the bridge otherwise, so far as is shown by the record. McGhan was not employed at any work on the bridge, but at the end of the bridge, on shore. It does not appear from the evdience in the record that there was provided for the workmen any other way of crossing the river which would be more safe than the way chosen by McGhan. There is evidence in the record that there were other bridges crossing the river, but the character of those bridges was not shown. McGhan was injured on the first day he commenced

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work for defendant in error. The burden rested on the administratrix to prove that the injury from which his death occurred arose out of and in the course of his employment. Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Northern Illinois Light & Traction Co. v. Industrial Board, supra. Inasmuch as an injury occurring during the noon hour only arises out of and in the course of the employment when the employee is using a way which he had a right to use and which was the only available way, or as safe as any other available way, to reach the place he was to eat his lunch, it was incumbent on the administratrix to establish those facts by competent evidence. The record is silent upon that question and simply does not show whether or not there was such an available way other than the crossing of the railroad bridge.

[4] The record in this case does disclose that McGhan violated the instructions of the superintendent of his employer in attempting to walk across the bridge. On Saturday before the day he commenced his work he was told by the superintendent not to undertake to walk across the bridge. He was then seeking employment of the company as signal man on the bridge, which was denied him because of his age and supposed inability to protect himself. He was 62 years old, lame, and walked with a cane. He was, however, at that time employed as stationary engineer, and was to commence his work on the following Monday.

Plaintiff in error insists that there is no competent evidence in the record to sustain the claim that McGhan was violating an order of the superintendent, because the testimony was by an employee of the defendant in error to the effect that he heard the superintendent tell McGhan not to cross the bridge, and that the testimony was incompetent because it was against the representative of the deceased, and that the deceased could not be present to refute the testimony. However, the record further shows that the arbitrator sustained plaintiff in error's objection to such evidence, and that plaintiff in error thereafter, in the course of the cross-examination of the witness, brought out the same facts without any objection whatever and without even having made a motion to exclude such evidence. She is therefore not in a position to complain at this time that such evidence is incompetent.

[5] As it appears from the record that the deceased was violating an instruction of his employer, given by the superintendent in charge of the work, when the accident occurred, the injury cannot be said to have arisen out of and in the course of the employment. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Northern Illinois Light & Traction Co. v. Industrial Board, supra.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SUPREME COURT OF ILLINOIS.

REYNOLDS

v.

CHICAGO CITY RY. CO. (No. 12337.)*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ACTIONS AT COMMON LAW—PLEADING.

Under Workmen's Compensation Act, it is essential, in bringing an action for personal injuries at common law, that it be made to appear

*Decision rendered, Feb. 20, 1919. 122 N. E. Rep. 371.

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from the statement and shown by the evidence that defendant had elected not to comply with the provision of the act.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ELECTION.

Workmen's Compensation Act, §§ 2, 3, permit an election only by filing and posting notices not to be bound 60 days before the expiration of the calendar year, and failure to post such notices within that time is an election to comply with the provisons of the act for the ensuing calendar year.

(For other cases, see Master and Servant, Dec. Dig. § 359.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ELECTION—PLEADING—ESTOPPEL.

In an action by a street railroad employee for personal injuries, that the employer had posted notices of election not to operate under the Workmen's Compensation Act, although such posting was insufficient, *held* not to estop the employer from denying that it had effectually rejected the act.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Farmer, J., dissenting.

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; M. L. McKinley, Judge.

Action by Patrick Reynolds against the Chicago City Railway Company. A judgment for plaintiff was reversed by the Appellee Court (210 Ill. App. 379), and plaintiff petitions for certiorari. Affirmed.

James C. McShane, of Chicago, for plaintiff in error.

Charles Le Roy Brown, of Chicago (Franklin B. Hussey, of Chicago, of counsel), for defendant in error.

DUNN, J. Patrick Reynolds was a motorman in the employ of the Chicago City Railway Company, and on December 21, 1914, in the course of his employment, was injured by the collision of two cars. He brought suit against his employer in the superior court of Cook county and recovered a judgment, which the Appellate Court for the First District on appeal reversed. 210 Ill. App. 379. The judgment included an order remanding the cause to the superior court, but upon the motion of the appellee, and on his showing that he could not on any future trial make out any better case than he had proved on the previous trial, the Appellate Court struck out the order of remandment. Reynolds then filed a petition for a writ of certiorari to bring up the record for review, and it was allowed.

[1] The defendant in error insists that the judgment of the Appellate Court was entered against plaintiff in error on his own motion and that he therefore cannot insist on its reversal. This is not in accordance with the record. The judgment was reversed, as shown by the opinion of the Appellate Court, for the errors assigned by the defendant in error, and those assigned by the plaintiff in error were not considered. From the nature of the error found, the remandment of the cause followed as a matter of course. The plaintiff in error had a right to another trial of the cause, but because he could not prevail on such a trial he requested the court to strike out the order of remandment. This would not amount to a confession of error or a consent to the judgment, which had been rendered against him over his objection; but it was a waiver only of his right to have a new trial in the superior court, or to complain that the

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cause was not remanded. The judgment of reversal was then final against him, but it cannot be said to be a judgment by consent or on his own motion.

The declaration alleged that the defendant was operating a street railway line on the streets of the city of Chicago and street cars thereon for the carrying of passengers for hire, that the plaintiff's injury occurred through the negligence of the defendant, that the defendant and plaintiff were both employed in a business to which the Workmen's Compensation Act applied, and that the defendant had elected not to provide or pay compensation according to the provisions of that act for accidental injuries sustained by its employees. The Appellate Court reversed the judgment, because the plaintiff failed to prove the filing of notice with the Industrial Board by the defendant of its selection not to provide and pay compensation under the Workmen's Compensation Act (Laws 1913, p. 335) within the time required by that act, and therefore the court erred in denying the defendant's motion to find a verdict for it.

[2] The Workmen's Compensation Act has divided employers and employees who come within its terms into two classes, those who have accepted the provisions of the act and those who have not. The rights and liabilities of the two classes are different, and are secured and enforced by entirely different processes. The case alleged in the plaintiff's declaration is one of an employer and employee who have not accepted the provisions of the act. It was essential to the statement of a cause of action that it should appear that the defendant had elected not to comply with the provisions of the Workmen's Compensation Act, and equally essential to a recovery that this fact should be shown by the evidence. Beverdige v. Illinois Fuel Co., 283 Ill. 31, 119 N. E. 46; Barnes v. Illinois Fuel Co., 283 Ill. 173, 119 N. E. 48. The Workmen's Compensation Act of 1913 took effect on July 1, 1913. There is no evidence that defendant in error ever elected not to comply with the provisions of the act for the year 1913 and it is therefore conceded that it was subject to the provisions of the act until the end of that year. It is shown that it did file a notice with the Industrial Board on November 4, 1913, of its intention not to provide and pay compensation to its employees according to the terms of the act on and after January 1, 1914. We held in Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627, that under the Workmen's Compensation Act of 1913 employers who did not give notice of their intention to comply or not to comply with the act were bound by it until they gave notice of an intention not to provide and pay compensation according to its provisions, and that they had the right to give such notice at any time after the act took effect until 60 days before the succeeding first day of January, but that after that date the provisions of the act providing for yearly terms would operate upon all employers and require them to give 60 days' notice of withdrawal from the act prior to the 1st of January, 1914, or any year thereafter, or remain bound by the provisions of the act for the following calendar year. The defendant in error therefore was subject to the provisions of the act in 1913, and if it desired to elect not to comply with its provisions after the first of January, 1914, it was necessary to file its notice with the Industrial Board 60 days before that date. Since the notice was not filed until less than 60 days before that date the defendant in error continued subject to the provisions of the Workmen's Compensation Act throughout the year 1914.

The plaintiff in error argues that it was not necessary to the decision of the Victor Chemical Works Case that any limit should be placed on the time in which employers could reject the act, and that it was more reasonable and more consistent with the provisions of the act referring to the calendar year to construe it as fixing December 31 as the last date under which the act could be rejected than November 1. Section 1 of the act provided that the election to provide and pay compensaton accord-

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ing to the provisions of the act should be made by the employer's filing notice of such election with the Industrial Board. Section 2 provided that every employer enumerated in paragraph (b) of section 3 (which includes the defendant in error) should be conclusively presumed to have filed notice of his election as provided in section 1, and to have elected to provide and pay compensation according to the provisions of the act unless and until notice in writing of his election to the contrary was filed with the Industrial Board. Therefore, under these two sections the defendant in error was conclusively presumed to have filed the notice of its election to provide and pay compensation under the act and to have elected to provide and pay compensation according to the act. Then, by the further provision of paragraph (b) of section 1, having elected to provide and pay compensation according to the provisions of the act, as it was conclusively presumed to have done, the defendant in error was bound, as to all its employees covered by the act, until January 1, 1914, and thereafter for terms of each year, unless it gave notice, 60 days before the expiration of any calendar year, of its election not to provide and pay compensation. Construing these sections together the statute declared that the defendant in error, after the passage of the act, was bound by its provisions for the remainder of the year 1913 unless it gave notice to the contrary, and for terms of one year thereafter, provided that it might elect not to provide and pay compensation after the expiration of any calendar year by giving the requisite notice 60 days prior to the expiration of such calendar year. Being bound by the provisions of the act for 1913, the defendant in error would continue to be bound by them for the year 1914, unless it gave notice to the contrary. The reasonable conclusion is that arrived at in the case of Victor Chemical Works, that the time within which the defendant in error might have rejected the act for the year 1913 expired 60 days prior to January 1, 1914.

[3] The plaintiff in error insists that by its notice filed with the Industrial Board on November 4, 1913, and by the notice posted, defendant in error should be deemed to have made a binding election not to provide and pay compensation to its employees for injuries sustained by them; that having elected to treat its notice as filed in time though it was actually filed too late, it is estopped from denying that it effectually rejected the act; and that by its course of conduct in paying no attention to the requirements of the act, failing to report to the Industrial Board the accidents to its employees, and representing to its employees that it was not under the act, it is estopped to claim now that during all the time it was subject to the provisions of the act. The statute provided for fixing the status of various employers and employees throughout the state, either under the provisoins of the act or not under the provisions of the act, with different rights and liabilities accordingly. The act was made elective. The manner in which the election could be made was definitely provided. If an election to provide compensation according to the provisions of the act was made in the manner provided, the statute declared the rights of the parties should be as established by the act. If the election was not made, then the rights of the parties were to be declared according to a different standard. The statute is to be given effect as it was written. When it says that an election must be made in a particular way it is not for the court so say that it may be made in some other way. The employer either is exempt from the act by reason of having done the things which the statute requires to be done, or her is under the act by reason of his having failed to do those things. His liabilities to his employees are fixed by the law in either case. The act itself permits an election in only one way—by filing and posting the notices within the prescribed time. There can be no other election. The failure to file and post notices within that time is an election to comply with the provisions of the act, which must stand for the calendar year,

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and no other course is open to the employer. His rights and liabilities with respect to his employees during any calendar year are fixed by the law 60 days before the beginning of the year, according as notice has or has not been filed and posted. They are governed by one system of laws, if the notice of rejection has been filed and posted, and by another system of laws if it has not.

[4] The doctrine of estoppel has no application. If the defendant in error has not elected to reject the act in the manner required by law, then the statute expressly prohibits the bringing of any action against it for damages for any injury to an employee. In all such cases the statute has abolished the common-law action for negligence. There is no legal liability in such case. An estoppel cannot create one. At common law a servant injured by the negligence of his master could maintain an action in which he might recover damages to whatever amount he might be able to prove. Under the statute there is no liability for damages, and the employee can maintain no action against his employer, but is entitled to an award of compensation according to a fixed scale, which may equal or be greater or less than his damages. No estoppel against the employer under a system or code where no cause of action for negligence exists can create such a cause of action against him. The measure of the responsibility of such an employer for the injury or death of an employee is declared by section 11 of the act to be the compensation provided by the act. If by any deception, misrepresentation or fraud the employer has deprived an employee of this compensation, the latter could, no doubt, maintain an action to recover the compensation to which he was entitled, but he would have no cause of action for negligence which caused the injury.

The evidence from which the estoppel is claimed to arise was not, in any event, such as to require its submission to the jury. It was shown that on November 4, 1913, there was filed with the Industrial Board a notice dated October 27, 1913, that the defendant in error would not after January 1, 1914, provide and pay compensation to its employees according to the provisions of the Workmen's Compensation Act. This notice contained a statement that the defendant in error was advised that the act was unconstitutional and that the giving of the notice must not be regarded as a recognition of the validity of the act. This notice was also posted at the car barn where plaintiff in error worked, with a heading notifying the employees that the defendant in error had filed such notice with the Industrial Board. On May 9, 1914, the Chicago Surface Lines (including the defendant in error) filed a notice reaffirming the election not to provide and pay compensation. Many injuries of employees of the defendant in error occurred during 1914, but none were reported to the Industrial Board, and there was no effort on the part of the defendant in error to comply with the act. All cases of injury in 1914, except that of the plaintiff in error, were settled by the defendant in error. In February, 1915, the plaintiff in error had an interview with Rowley, the head of the defendant in error's claim department, in regard to the settlement of his claim, in which, as he testified, Rowley said the company was not working under the Workmen's Compensation Act. These notices were not filed or posted in time. The notice posted at the barn simply notified the employees that the notice posted was a copy of one filed with the Industrial Board, but did not say when it was filed. The action of the defendant in error in not reporting accidents and adjusting claims for injuries was in accordance with its claim that the act was unconstitutional. Rowley's statement was in accordance with the same claim and was not the misrepresentation of any fact. It is manifest that the defendant in error was not working under the Workmen's Compensation Act—that is, that it was not complying with the provisions of the act. The officers of the defendant in error were advised that the act was unconstitutional, and for that reason, as well as others, possibly,

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the defendant in error rejected its provisions. Nothing is shown to have been said or done which amounted to any misrepresentation or concealment of a fact or which was done with an intent to deceive or a knowledge or belief that it would be acted upon, or which was not equally within the knowledge or means of knowledge of the plaintiff in error as of the defendant in error.

The judgment of the Appellee Court will be affirmed.

Judgment affirmed.

Farmer, J., dissenting.

SUPREME COURT OF ILLINOIS.

VOSE ET AL.

CENTRAL ILLINOIS PUBLIC SERVICE CO. (No. 12329.)*

1. MASTER AND SERVANT—SUIT AGAINST THIRD PARTY—PLEADING.

In suit based on the first clause of Workmen's Compensation Act, § 29, to recover amount paid for lineman's death, due to his coming in contact with defendant's high-tension wires, declaration which in substance alleged that defendant was engaged in "electrical work" was not defective, because it failed to allege that defendant had not elected to be governed by the act, in view of section 2.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

2. MASTER AND SERVANT—ELECTION TO BE GOVERNED BY WORKMEN'S COMPENSATION ACT—PRESUMPTION.

Contention that presumption, under Workmen's Compensation Act, § 2, that a person engaged in one of the hazardous occupations enumerated is subject to the act, applies only between the employer and employee, and not as against a third party, cannot be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ELECTION—NECESSITY.

In suit by employers under Workmen's Compensation Act, § 29, to recover amount paid for employee's death, due to contact with defendant's high-tension wires, where defendant was engaged in an occupation making it subject, in view of section 2, to the act, unless it elected to the contrary, and the proof showed that neither plaintiffs nor their employee had made any election, judgment will not be reversed because plaintiffs did not prove that they and their employee had elected to be bound by the act.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

4. MASTER AND SERVANT—ADMISSION OF IMPROPER TESTIMONY—HARMLESS ERROR.

In suit by employers under Workmen's Compensation Act, § 29, to recover amount paid for employee's death, due to contact with defendant's high-tension wires, where proof showed that defendant's wires not suffi-

*Decision rendered, Feb. 20, 1919. 122 N. E. Rep. 134.

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ciently insulated, admitting verdict of coroner's jury that death was due to contact with defendant's wires not sufficiently insulated was harmless.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ACTION AGAINST WRONGDOER.

In suit by employers under Workmen's Compensation Act, § 29, to recover amount paid for employee's death, due to contact with defendant's high-tension wires, it was not error to exclude testimony that plaintiffs had insured their employees and that compensation awarded deceased's personal representative had been paid by insurance company.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

Error to Appellate Court, Third District, on Appeal from Circuit Court, McDonough County; Harry M. Waggoner, Judge.

Action by Lyman B. Vose and others against the Central Illinois Public Service Company, to recover amount of award against plaintiff in proceedings under Workmen's Compensation Act. The Appellate Court affirmed a judgment of the circuit court in favor of plaintiffs, and defendant brings certiorari. Judgment affirmed.

Vause, Hughes & Kiger, of Mattoon, for plaintiff in error.

H. L. Howard, of Chicago, and Sawyer & Hainline, of Macomb, for defendants in error.

FARMER, J. This case comes to this court by certiorari to review a judgment of the Appellate Court for the Third District, affirming a judgment of the circuit court of McDonough county in favor of defendants in error against plaintiff in error for $2,370.61.

Defendants in error, as a committee of re-organization of the Western Illinois Telephone Company, were in June, 1915, in possession of and operating a telephone system in the city of Bushnell, Ill., and other cities and villages in that vicinity. Forest C. Shanks was employed by defendants in error as a telephone lineman in the city of Bushnell. On June 7, 1915, Shanks, while inspecting a line of wire of defendants in error carried by poles through the branches of a tree standing between two poles, came in contact with a wire charged with electricity of high power and voltage, from which he received such burns and injuries that he died soon thereafter. Below the telephone wires, a distance of some 1 or 1½ feet, were wires of plaintiff in error supported by cross-arms on the same poles the telephone wires were on. These wires of plaintiff in error were high-tension wires, carrying 2,200 volts each, and were used by the plaintiff in error in the conduct of its business. All the telephone and electric wires passed through the branches of the tree between the two poles from which they were supported. About noon on the day mentioned Shanks was found beneath the tree very badly burned and injured. He was unconscious and died soon afterwards. The administratrix of his estate filed a petition with the Industrial Commission for compensation against defendants in error and was allowed a lump sum of $2,129.61, which they paid, together with a hospital bill of $41.50 and a surgeon's bill of $151.50, making the total amount paid $2,370.61. This suit was brought by defendants in error against plaintiff error, under section 29 of the Workmen's Compensation Act, to recover the amount they were compelled to pay.

The declaration charged plaintiff in error with negligence in maintaining its wires in a defective state of insulation for a long period of time prior to the accident and in such close proximity to the other wires as to endanger the life and limb of any one lawfully in said tree; that it knew, or in the exercise of ordinary care should have known, of

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the dangerous condition of said wires, and had been notified of said condition numerous times within 30 days of the accident; that Shanks, as the employee of defendants in error to inspect its wires in said tree and repair the same, climbed the tree to perform his duties, and while in the exercise of due care and caution for his own safety, and as a direct result of the negligence of plaintiff in error in maintaining its wires in a defective condition of insulation, the high current carried by plaintiff in error's wires was communicated to the body of Shanks, severely burning and injuring him, causing him to fall from the tree to the ground, and as a direct result of said injuries he died. The declaration alleged the award made to Shanks' administratrix and the amount paid by defendants in error, and set out in hæc verba section 29 of the Workmen's Compensation Act, by virtue of which defendants in error claimed the right to be reimbursed. The declaration alleged that both defendants in error and Shanks had elected to accept the provisions of the Workmen's Compensation Act, but there was no allegation in the declaration of the acceptance or rejection of the act by the plaintiff in error. Plaintiff in error filed a plea of the general issue and two special pleas. A demurrer was sustained to the special pleas and the declaration was subsequently amended but no other pleas were filed.

[1] It is insisted with great earnestness that, as the declaration did not allege plaintiff in error had elected either to be bound by the Workmen's Compensation Act or not to be bound by it, there can be no recovery under section 29. It is contended that, to authorize a recovery under the first clause of section 29, the declaration must aver that the defendant had elected to be bound by the act, and such averment must be proven to authorize a judgment, and that under the second clause of section 29, to authorize a recovery, it must be alleged and proved that the defendant had elected not to be bound by the act.

The first clause of section 29 applies where all the parties—the employer, the injured employee, and the third party whose negligence caused the injury—are subject to the Workmen's Compensation Act. That clause reads as follows:

"Where an injury or death for which compensation is payable by the employer under this act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, then the right of the employee or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employee." Laws 1913, p. 354.

According to the averments of the declaration plaintiff in error was engaged in a hazardous business or occupation. Section 2 of the act of 1913 provides that every employer enumerated in paragraph "b" of section 3 shall be conclusively presumed to have filed notice of his election to provide and pay compensation according to the act, unless and until he gives notice of a contrary intention in accordance with the provisions of the statute. Among the employments or occupations where the employer is conclusively presumed to have elected to be governed by the act is "electrical work." The declaration in substance and effect alleges plaintiff in error was engaged in that work. It is not claimed it had elected not to be bound by the act, and in the absence of such an election it is "conclusively presumed" to have elected to provide and pay compensation under the act. It was unnecessary, therefore, to explicitly allege in the declaration that plaintiff in error had elected to be bound by the act, because from the fact alleged the law conclusively presumed that plaintiff in error had so elected. The declaration was sufficient in this respect, as

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it was based upon and the recovery had under the first clause of section 29, which applies where all the parties are subject to the Workmen's Compensation Act. If the recovery had been sought under the second lause of said section it would have been necessary to have averred that claintiff in error had elected not to be bound by the act.

[2] Plaintiff in error argues that the presumption that a person engaged in one of the hazardous occupations enumerated in the statute is under and subject to the act applies only as between the employer and the employee but does not apply where the action is against a third party. This question was decided contrary to that contention in Johnson v. Choate, 284 Ill. 214, 119 N. E.972.

[3] It is also contended that the judgment should be reversed because defendants in error did not prove that they and their employee Shanks, had elected to be bound by the Workmen's Compensation Act. It does not appear from plaintiff in error's Appellate Court brief, which defendants in error were granted leave to file in this case, that this question was raised in the Appellate Court; but, even if it had been raised, we do not think the point a good one. Defendants in error were engaged in an occupation which the statute made subject to the act unless they elected to the contrary, and the proof shows that neither defendants in error nor Shanks had made any such election.

[4] It is also insisted the court erred in admitting in evidence the verdict of the coroner's jury. The verdict recited the jury found Shanks "came to his death by coming in contact with electrical wires of the Central Illinois Public Service Company in Bushnell, Ill., June 7, 1915, which were not sufficiently insulated." Whether or not the verdict was competent is immaterial in this case, as the proof abundantly showed plaintiff in error's wires were not sufficiently insulated, and in any event it was not harmed by the admission of the verdict in evidence.

[5] Plaintiff in error also sought to prove on the trial that defendants in error had caused their employees to be insured by the Fidelity & Casualty Company of New York, and that the compensation awarded the personal representative of Shanks had been paid by that company and that nothing had been paid by defendants in error. The court refused to allow the proof, and this is assigned as error. No authority is cited to support the position of plaintiff in error and we know of none. If defendants in error insured their employees, it was for their benefit and not for the benefit of plaintiff in error This ruling of the court is sustained in Otis Elevator Co. v. Miller & Paine, 240 Fed. 376, 153 C. C. A. 302.

The proof tended to sustain the allegations of the declaration that Shanks was in the exercise of due care for his own safety, and that it was the duty of plaintiff in error to insulate its wires at the point of contact, and that the failure to do so caused the death.

The judgment is affirmed.

Judgment affirmed.

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SUPREME COURT OF ILLINOIS.

WANGLER BOILER & SHEET METAL WORKS CO.

v

INDUSTRIAL COMMISSION ET AL. (No. 12461.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMMON-LAW AND STATUTORY LIABILITY FOR DEATH.

An employer, not included in any of the classes enumerated in Workmen's Compensation Act, § 3. in view of section 1, may, by operating under the act, free himself from the common-law or statutory liability for injuries to employees arising out of and in course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —THEORY OF LIABILITY.

Compensation under the Workmen's Compensation Act is analogous to, and is to take the place of, damages at common law or under the Personal Injuries Act.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —RIGHT TO COMPENSATION—REMARRIAGE OF WIDOW.

Widow of deceased employee, to whom compensation had been awarded under the Workmen's Compensation Act, did not lose her right to the compensation by remarriage

(For other cases, see Master and Servant, Dec. Dig. § 393.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—THEORY OF.

The Workmen's Compensation Act, is not based on the theory that it provides a means of support during the period of adjustment following the death or injury of an employee, but on the idea of compensation for death or injury arising out of and in course of employment, and on the broad economic theory that such compensation is properly chargeable as a part of the cost of industrial activity and production.

(For other cases. see Master and Servant, Dec. Dig. § 346.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHTS OF BENEFICIARY—POWER OF LEGISLATURE.

The Legislature has the power to place limitations upon the rights of beneficiaries under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Error to Circuit Court, Montgomey County; Thomas M. Jett, Judge.

Proceeding under the Workmen's Compensation Act for compensation for the death of Frank Lewis, opposed by the Wangler Boiler & Sheet Metal Works Company, employer. Judgment on the Industrial Commission's award was granted by the Circuit Court on petition by H. B. Herrick, administrator, on employer's failure to pay award, and employer brings error. Judgment affirmed

*Decision rendered, Feb. 20, 1919. 122 N. E. Rep. 366.

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G. A. Hodgman, of St. Louis, Mo., Russell B. James, of Chicago, and A. M Fitzgerald, of Springfield, for plaintiff in error.
P. McWilliams, of Litchfield, for defendant in error.

STONE, J. The circuit court of Montgomery county entered judgment upon an award by the Industrial Commission for compensation against plaintiff in error for the death of Frank Lewis, due to accidental injury sustained on June 9. 1917. The sole beneficiary of the award and the only dependent at the time of the accident was Reater Lewis, his widow. The installments specified in the award made by the arbitrator appointed by the Industrial Commission were paid in amounts and at the times specified in the award until the widow was remarried to Isaiah Vanderburg, from which time plaintiff in error has refused to pay such award. A petition under paragraph "g" of section 19 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 144) was presented by defendant in error to the circuit court of Montgomery county asking for judgment upon the award by reason of such refusal to pay the same. The petition sets out that the beneficiary has remarried Plaintiff in error filed an answer to the petition, setting up that as the beneficiary had remarried she was no longer a dependent, and that payment of compensation should cease. Exceptions were filed to the answer. and it was stipulated that the question should be determined on the petition, answer, and exceptions thereto. The circuit court held that the remarriage of the beneficiary was not a defense to the petition, and entered judgment on the award, and granted a certificate of importance in accordance with the statute

It is contended by the plaintiff in error that, as respects the widow and minor children of a deceased employee under the Workmen's Compensation Act, the compensation is based on the theory of support for dependents, and on that theory alone; that it is intended to provide support for the widow and children during what counsel for plaintiff in error style the "period of adjustment" that follows the death of the breadwinner of the family, or only so long as such dependent exists, and is intended to relieve society of the burden of caring for such dependents. Counsel cite in support of that contention the provisions of the act found in section 21 (section 146), that on the death of a dependent the compensation is extinguished, unless such dependent is survived by a parent, sister, or brother who was dependent on the deceased at the time of his injury, in which case compensation may be diminished.

Section 7 (section 132) of said act fixes the compensation in case of injury resulting in the death of the employee. Paragraph "f" of said section contains the following proviso:

"Provided. such compensation may be paid in a lump sum upon petition as provided in section 9 of this act."

Section 9 (section 134) provides that:

"Any employer or employee or beneficiary who shall desire to have such compensation, or any unpaid part thereof, paid in a lump sum, may petition the Industrial Board, asking that such compensation be so paid."

That section further provides that upon notice and a hearing, if it appears for the best interest of the parties that a lump sum settlement be had the board may so order it, the section also fixing the method of arriving at the amount of such lump sum to be paid. The section further provides:

"Either party may reject an award of a lump sum payment of compensation. except an award for compensation under section 7," etc.

Section 1 (section 126) of the act provides:

"That any employer in this state, who does not come within the classes enumerated by section 3 of this act, mav elect to provide and pay

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compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this act, and thereby relieve himself from any liability for the recovery of damages, except as herein provided."

Paragraph "c" of section 1 provides that the liability of such employer for compensation is to be determined according to the compensation provisions of the act.

[1, 2] Plaintiff in error, unless it is within section 3 (section 128) of the act, had the right to elect whether it would operate under the act. By operating under the act it became freed from the common-law or statutory liability for damages for injuries arising out of and in the course of the employment of its employees. The right to damages for death or injury of an employee, at common law or under the Personal Injuries Act, was a vested right. Chicago, Peoria & St. Louis Railroad Co. v. Woolridge, 174 Ill 330, 51 N. E. 701.

[3, 4] Compensation under the act in question is analogous to and is to take the place of damages at common law and under the statute. While the right to compensation is not a subject of bequest of the beneficiary, but continues in the dependents of the beneficiary only in the manner provided by said act, yet such right to compensation, when determined according to law, is no less a vested right, and one that can be affected only by the act of the Legislature that gave it. Hansen v. Brann & Stewart Co., 90 N. J. Law, 444. 103 Atl. 696 The intention of the Legislature to so treat that right is shown by section 9 of the act, which, as we have seen, provides that where a lump sum settlement is awarded by the Industrial Board in case of an injury resulting in death there is no right of rejection either by the employer or beneficiary. The intention of the Legislature that such right shall be a vested right is further shown by paragraph "g" of section 19 of the act, which provides for judgment in the circuit court on an award where there is a refusal or failure to pay the compensation; such judgment being treated as similar to an execution. Friedman Manf. Co. v. Industrial Com., 284 Ill. 554, 120 N. E. 460.

[5, 6] The Workmen's Compensation Act contains no provision for the extinguishment of compensation where the widow of the deceased employee remarries, and we can see no reason, on principle, for reading such a provision into the act. We do not adopt the view of counsel for plaintiff in error that the basis of the act is merely that of providing support through a "period of adjustment," but, as its title indicates, the act is based on the idea of compensation for death or injury arising out and in the course of the emlpoyment. The act is also based on the broad economic theory that such death or injury is an incident of industrial activity and production, and that compensation therefor is properly chargeable as a part of the cost of such activity and production.

[7, 8] The Legislature has the power to place limitations upon the rights of beneficiaries; but courts have no power to put a limitation upon a right legally given by the Legislature, unless by a fair construction of the act it can be said that such limitation was in furtherance of legislative intent. Such a limitation as is contended for by plaintiff in error cannot be placed on this act, without reading into the act that which is not to be found either in its language or spirit. The right to compensation being a vested right of the beneficiary, the liability of the employer on the vesting of that right becomes fixed, and in the absence of an act of the Legislature under which such right becomes divested, we are unable to see wherein the conduct of the beneficiary can be said to affect such liability on the part of the employer. If an act on her part does not increase his liability, then obviously it is of no concern to him, as his liability has been fixed by law. There appears to be no more reason, in the absence of legislative provision therefor, for holding that remarriage of the widow would extinguish her compensation, than to hold that such result would follow in case she were to receive a legacy, or

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by her wits acquire a competency, within the period for which compensation is to be paid.

The case of In re Murphy, 224 Mass. 592, 113 N. E. 283, has been cited by counsel for plaintiff in error in support of their contention that the right to compensation in this case ceased upon the remarriage of the beneficiary. In that case the statute was silent as to the matter of payment of compensation after the death of the beneficiary, and the Massachusetts court held that the compensation was extinguished. Counsel argue that by analogy, the Illinois Compensation act also being silent as to the subject in question, compensation should likewise be extinguished. That case was decided on the ground that, at the time of the injury of the deceased employee, his mother, who was the beneciary, was his sole next of kin and the only person dependent on him for support, and that upon her death compensation ceased. There is nothing in the case cited which will support the analogy sought to be established with the case at bar.

In the case of Hansen v. Brann & Stewart Co., supra, the New Jersey Supreme Court held, under a statute similar to ours, that the remarriage of the beneficiary, who was the widow of the deceased employee, did not extinguish the compensation. This we believe to be the true rule.

The judgment of the circuit court will be affirmed.

Judgment affirmed

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

CONSUMERS' CO.

v.

CEISLIK. (No. 10476.)*

1. MASTER AND SERVANT—AWARD BY ONE MEMBER OF INDUSTRIAL BOARD—REVIEW BY FULL BOARD.

Where, on review pursuant to Workmen's Compensation Act, § 60, by full board of award made by one member, appellant made no showing as to what additional testimony sought to be introduced by him would be, but stated only a conclusion, the board did not abuse its discretion in refusing to permit him to introduce the additional testimony.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —AWARD—REVIEW.

On review pursuant to Workmen's Compensation Act, § 60, by full board of an award made by one member, the admission of additional evidence was discretionary, and the action of the board in that regard is not subject to review, unless the record shows an abuse of discretion.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION —FINDINGS OF INDUSTRIAL BOARD—REVIEW.

The Industrial Board like a jury may draw reasonable inferences from the facts and circumstances, and a finding by the board stands upon

*Decision rendered, Feb. 11, 1919. 121 N. E. Rep. 832.

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the same footing as a finding of a trial court or the verdict of a jury, and when sustained by competent evidence is binding on the court on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —FINDINGS OF INDUSTRIAL BOARD—REVIEW.

Where every material fact found by the Industrial Board is sustained by some competent evidence, the court on appeal will not interfere, though some of the evidence is conflicting.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —FINDINGS—REVIEW.

The mere fact that incompetent evidence is heard is no cause for reversal where there was some competent evidence which tended to establish every material fact found by the Industrial Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

6. MASTER AND SERVANT—PERSONAL INJURIES—"ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT."

Plaintiff servant, who, upon discovering that no chute with which to unload coal had been placed on his wagon, went to a nearby saloon and telephoned to his master's office, and who was struck by a passing automobile while in the act of mounting his wagon after he returned, *held* injury by accident "arising out of and in the course of his employment" within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

7. MASTER AND SERVANT—AWARD OF INDUSTRIAL BOARD —GROUNDS FOR REVERSAL.

That the Industrial Board awarded compensation for maximum period of 500 weeks instead of 300 weeks, as asked by claimant, does not afford ground for reversal, the duration of award being limited as the law provides, and the appellant not having shown that its rights were in any way prejudiced.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

8. MASTER AND SERVANT—AWARD OF INDUSTRIAL BOARD —GROUNDS FOR REVERSAL.

The exact degree of impairment to claimant's eye not being shown by the evidence, the fact that the Industrial Board left permanent impairment of vision open for future consideration is not a cause for reversal.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from Industrial Board.

Proceedings for compensation under the Workmen's Compensation Act by Joe Ceislik against the Consumers' Company. From an award for claimant by the full board upon review of an award made by a single member, the Company appeals. Affirmed.

McKinley, Hansen & Schmauch, of Chicago, Ill., for appellant.
McMahon & Conroy, of Hammond, for appellee.

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BATTMAN, P. J. Appellee filed his claim before the Industrial Board, alleging that on April 13, 1918, he received personal injuries by reason of an accident arising out of and in the course of his employment by appellant, and asking for an adjustment of his compensation under the Workmen's Compensation Act (Laws 1915, c. 106). The claim was heard before a single member of the board, who made a finding and an award in favor of appellee. Appellant, in due time, filed its application for a review of said award. Prior to the hearing on review, appellant requested leave to submit new and additional evidence on such hearing, and supported his request by the affidavit of its assistant secretary. This request was denied, and the full board thereafter reviewed the evidence introduced at the original hearing, and, having heard the argument of counsel, made a finding of facts on which the full board made the following award:

"It is therefore considered and ordered that the plaintiff be, and he is hereby, awarded compensation at the rate of $10.40 per week on account of his disability to work for the injuries received other than to his right eye, beginning on the 28th day of April, 1918, and to continue so long as the plaintiff's injuries, other than the injury to the right eye, wholly disable him for work, not exceeding 500 weeks, and providing that the total compensation shall in no event exceed $5,000. It is further ordered that the question as to the degree of permanent impairment, if any, of the vision of the plaintiff's right eye, be and the same is hereby ordered left open for future consideration. It is further ordered that the defendant pay the cost of the proceedings."

From this award appellant has appealed, and has assigned errors which require a consideration of the questions hereinafter determined.

[1, 2] Appellant contends that the denial of its request for leave to submit additional evidence on review of the original award was an abuse of discretion on the part of the board. Section 58 of the Workmen's Compensation Act provides for filing an application before the Industrial Board for a hearing, where the parties fail to reach an agreement in regard to compensation. Section 59 provides that the board, by any or all of its members, shall hear the parties at issue, their representatives and witnesses, and shall determine the dispute in a summary manner. Such determination is final and conclusive, unless one of the parties feels aggrieved by the decision. In that event, if such award was made by less than all members of the board, the dissatisfied party may have a review thereof, by filing an application therefor within the time designated in section 60 of said act. On such review the parties are not given a right to submit additional evidence, but under the provisions of said section 60, the board may hear additional evidence if it deems it advisable to do so. This renders the admission of additional evidence discretionary with the board, and its action in that regard is not subject to review by this court, unless the record shows an abuse of such discretion. Bimel, etc., Co. v. Loper (1917) 117 N. E. 527.

In the instant case the parties were given an opportunity to submit all their evidence at the first hearing before the single member of the board. On the hearing on review, appellant was not entitled as a matter of right to submit additional evidence. It recognized such fact, and sought to have the board exercise its discretion in that regard in its favor. To that end, it submitted the affidavit of its assistant secretary in support of such request, and attempted thereby to show facts which would make a denial thereof an abuse of discretion on the part of the board. Appellant's brief states that it is shown by said affidavit that:

"Three persons, whose names appellant is ready to submit to the board, have since then [the former hearing] disclosed the fact that they were eyewitnesses to circumstances that show that appellee was not, at the time of the injury, in the service of appellant, but engaged on a personal errand of his own."

It also states that said affidavit shows that another witness has been

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discovered since the original hearing, whose name appellant is ready to furnish to the board, "who will, if called, disprove the testimony of appellee concerning the facts and circumstances surrounding the accident, and impeach his testimony, and show that appellee was at the time of the injury engaged in a personal mission of his own, and not on the business of the company." This is the only evidence which appellant asked to submit on review, and the only showing as to its character, as far as disclosed by appellant's brief. It will be observed that there is no showing as to what the testimony of said witnesses would be, but only a statement of a conclusion in that regard. The board had a right to know what the testimony of each of such witnesses would be, in order that it might draw its own conclusion as to what it would tend to prove or disprove, if anything. In the absence of such a showing we cannot say that the board abused its discretion in refusing to permit appellant to introduce additional evidence at the hearing on review.

[3, 4] Appellant contends that the evidence is not sufficient to sustain the finding of facts. In considering this contention it should be borne in mind that a finding of facts by the Industrial Board stands upon the same footing as the finding of the trial court or the verdict of a jury, and when sustained by any competent evidence is conclusively binding on this court. Bloomington-Bedford Stone Co. v. Phillips (1917) 116 N. E. 850; Sugar Valley Coal Co. v. Drake (1917) 117 N. E. 937. Also that such board, like a court or jury, may draw reasonable inferences from the facts and circumstances in evidence. Haskell & Barker Car Co. v. Brown (1917) 117 N. E. 555. With these settled rules in mind, we have reviewed the evidence in the light of appellant's contention, and find ourselves unable to agree that it is not sufficient to sustain the finding of facts. Every material fact found is sustained by some competent evidence. True, some of it is strongly conflicting as appellant has cited, but it is not within the province of this court to weigh the same, and thereby determine its preponderance. Public Utilities Co. v. Cosby (1915) 60 Ind. App. 252, 110 N. E. 576.

[5] Appellant also contends that its rights were prejudiced by the board's consideration of incompetent evidence. If it be conceded that incompetent evidence was heard, it does not follow that the board gave it weight in arriving at its conclusions as to the facts established. The mere fact that incompetent evidence is heard is not cause for reversal, where, as in this case, there was some competent evidence which tended to establish every material fact found. United Paperboard Co. v. Lewis (1917) 117 N. E. 276.

[6] Appellant's contention that the facts found are not sufficient to sustain the award is not well taken. Such facts show that appellee was in the employment of appellant as a teamster at an average working wage of $18.90; that on said date, in the regular discharge of the duties of his employment, he was driving a team delivering coal; that he left appellant's place of business with a load of coal for delivery to a customer; that after driving about three squares and a half his hat was blown off his head; that he stopped his team, alighted from his wagon, and procured his hat; that upon going back to his wagon he discovered that the persons loading the wagon had failed to put a chute on it to be used in unloading the coal; that prior to that time he had been instructed by appellant that when he discovered that he did not have a chute and needed one, instead of returning to the yard with his load, he should call by phone, and a chute would be sent him; that, acting under said instructions, he went into a saloon near the point where his team had been stopped, and called appellant's officers, and requested that a chute be sent to him; that he returned from telephoning to his wagon, and while in the act of mounting the same he was struck by a passing automobile and run over; that as a result he sustained injuries which wholly disabled him for the work at which he was engaged at the time of the accident; and that

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appellant had actual knowledge of appellee's injury within ten minutes after it occurred. Such facts clearly show that appellee was injured by an accident arising out of and in the course of his employment. Bachman v. Waterman (1918) 121 N. E. 9. They also show that the disability for work still continued, and that the award was for the amount and duration provided by law, and hence not excessive, as appellant contends. Acts 1917, p. 227.

[7] The fact that the board awarded appellee compensation for maximum period of 500 weeks instead of 300 weeks, as asked by appellee in his claim for compensation does not afford ground for reversal. The duration of the award was limited as the law provides, and appellant has not shown that its rights were in any way prejudiced by the fact stated.

[8] Appellant also complains of that part of the award, which leaves the question of the degree of permanent impairment of the vision of appellee's right eye, if any, open for future consideration. It appears from the finding of facts that the exact degree of impairment to appellee's right eye is not shown by the evidence. Appellant cannot be required to pay any compensation on account of such injury without a further hearing and award, in which event it must be given full opportunity to protect its rights under the law in that regard. It is clear that such action of the board is not cause for reversal.

The award is affirmed, and by virtue of this statute the amount thereof is increased 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

INDIANA CAR & EQUIPMENT CO.

v.

CELOTTO. (No. 10419.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—APPEAL—CONFLICTING EVIDENCE.

Where the evidence is conflicting and tends to support the conclusion reached by he Industrial Board, the Appellate Court will not disturb the board's finding.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act (Laws 1915, c. 106) by Giovanni Celotto for compensation for injury, opposed by the Indiana Car & Equipment Company, employer. From the award of the Industrial Board for the employee, the employer appeals. Affirmed.

Pickens, Moores, Davidson & Pickens, of Indianapolis, an Bomberger, Peters & Morthland, of Hammond, for appellant.

Meade & Royce, of Chicago, Ill., for appellee.

DAUSMAN, C. J. Appellee was awarded compensation on the ground that he received an injury by accident while working for appellant.

* Decision rendered, Feb. 13, 1919. 121 N. E. Rep. 834.

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In its finding the Industrial Board has included the following facts:

"On April 11, 1917, the plaintiff was in the employment of the defendant as a carpenter at an average weekly wage of $25. On said date, while engaged in the discharge of the duties of his employment, and while lifting a sill weighing more than 400 pounds, the plaintiff suddenly, unexpectedly, and accidentally received a wrench or sprain of the dorsal section of the spinal column, as a result of which he has been totally disabled for work continuously since his injury until the original hearing of this claim and was then so totally disabled for work. The plaintiff's disability is probably total and permanent."

The only error assigned, which the court can consider, is that the award of the full board is contrary to law.

We have carefully examined the evidence, and we find that there is no controversy concerning the following facts:

Between 5 and 6 o'clock in the afternoon of April 11, 1917, the workman was lifting a car sill in an effort to put it over some other timber, when he felt a sudden and violent pain in his back. He fell to the ground and was unconscious for about ten minutes. He contrived to get home and immediately went to bed. The pain caused him to cry like a child. The next day his employer sent a physician to treat him. This doctor found him complaining of a severe pain in the back "across the lumbar region and on the left side immediately below the ribs." The doctor gave him an application to be rubbed on to stimulate the muscles; and, to the best of his recollection, used adhesive straps across the back to strap the muscles; and told him to apply external heat to the afflicted region. This doctor visited him about six times and was of the opinion that there was not much, if anything, wrong with him. Subsequently he had five other doctors and a chiropractor. On October 2, 1917, an X-ray plate was made which revealed the fact that the spine was 1½ inches out of alignment, the vertebræ in the region of the pain being curved that far to the left. The plate also indicated a pathological condition of the vertebræ. Tests were made which proved the existence of tubercular infection in the vertebræ. The workman was a strong man, 27 years of age. Just prior to his present employment he had worked nealy three years as a carpenter for the Chicago Great Western Railway Company and was accustomed to lifting car sills.

The real controversy rests on a dispute concerning cause and effect. Appellant contends that prior to the lifting of the sill the workman had been afflicted with tuberculosis in the vertebræ; that he was unconscious of the existence of the disease until the lifting called his attention to it; and that the disease was the sole cause of his disability—or, at least, the sole cause of the continuing disability. Appellee contends that the lifting caused a traumatism (broke the tissues, ruptured the blood vessels, and dislocated the vertebræ); that the tubercular process would never have come into existence but for the traumatism; and that the lifting is the sole cause of all the disability which has followed.

The evidence relating to this controversy is conflicting. Appellant's contention rests wholly on the opinion of the doctors. Appellee's contention rests partly on these opinions and partly on facts and circumstances from which the Industrial Board was competent to draw a conclusion without the aid of experts. The evidence tends fairly to support the conclusions reached by the board, and therefore we cannot disturb the finding. Haskell & Barker Car Co. v. Brown, 117 N. E. 555; Muncie Foundry & Machine Co. v. Coffee, 117 N. E. 524.

The award is affirmed, and by virtue of statute the amount thereof is increased 5 per cent.

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APPELLATE COURT OF INDIANA.

DIVISON NO. 1.

FT. WAYNE ROLLING MILL CORPORATION

v.

BUANNO ET AL. (No. 10450.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —CAUSE OF DEATH—EVIDENCE.

In proceeding under the Workmen's Compensation Act for compensation. evidence held sufficient to sustain a finding that injury to arm was cause of pneumonia, which resulted in death.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Industrial Board.

Proceedings by Vingenza Buanno and others under the Workmen's Compensation Act, to obtain compensation for the death of Pasqualle Buanno, opposed by the Ft. Wayne Rolling Mill Corporation, the employer. There was an award, and the employer appeals. Affirmed

Joseph W. Hutchinson, of Indianapolis, for appellant.
F. M Hogan, of Ft. Wayne, for appellees.

REMY, J. The findings of the Industrial Board which are material in determining the question presented are: That on November 28, 1917, Pasqualle Buanno. while in the employ of appellant, received a personal injury by accident arising out of and in the course of his employment, of whch appellant had actual knowledge, and filed report thereof to the board on December 19, 1917; that on February 28, 1918, said Buanno and appellant entered into a compensation agreement, which later was aproved by the board, whereby appellant agreed to pay compensation on account of said injury at the rate of $8.77 per week during the period of disability resulting therefrom, not exceeding 500 weeks, beginning December 8, 1917; that pursuant to such agreement appellant paid 14 successive weeks' compensation; that on April 12, 1918, said Buanno died as a result of his injuries, and left surviving him, as his sole and only dependents, the appellees herein. On this finding, the board awarded appellees compensation for 286 weeks at the rate of $8.77 per week, beginning April 12, 1918, and ordered that appellant pay funeral expenses not to exceed $100.

The sole question presented on ths appeal is whether the evidence is sufficient to sustain the finding that the death of Pasqualle Buanno was the result of the injuries received November 28, 1917. It is contended by appellant that the undisputed evidence shows the proximate cause of the death of said Buanno to have been pneumonia, and not the accident, and that the question of proximate cause is therefore a question of law. On this phase of the case the uncontradicted testimony of the attending physician is that on April 8, 1918, the wound resulting from Buanno's injury had not fully healed, there being at that time an open sore on the arm about an inch square, which became infected with erysipelas, causing the arm to become swollen to twice its normal size, and that this infection spread "over his neck to the side of his face, and finally developed into streptococal pneumonia." The attending physician also testified that:

*Decision rendered, Mar. 5, 1919. 122 N. E. Rep. 362.

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"There was no mistake in the diagnosis of the infection on the arm. It was erysipelas. There could be no such infection without some exterior brasure of the skin. There would have to be some point of entry. In my opinion the primary cause of this infection was the unhealed portion of his injury. It is rather common for pneumonia to follow such infection."

It is our opinion that the evidence fully sustains the finding that Pasqualle Buanno died as a result of the injury he received on November 28, 1917.

The award is affirmed, and, as provided by section 61 of the Workmen's Compensation Act (Acts 1915, c. 106), as amended by the act of 1917 (Acts 1917, p. 155), said award is increased by 5 per cent.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

PERU BASKET CO.

v.

KUNTZ. (No. 10454.)*

1. MASTER AND SERVANT — COMPENSATION — INJURIES ARISING OUT OF EMPLOYMENT—DISOBEDIENCE TO INSTRUCTIONS.

That a workman at the time he receives an injury is acting in violation of directions does not preclude the injury from arising out of the employment in view of Workmen's Compensation Act, § 8.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —WILFUL DISOBEDIENCE.

Where an employee with defective eyesight lost part of his hand in a cutting machine, where he had inadvertently placed it contrary to directions by his employer, evidence *held* to sustain a finding that the injury was not the result of a willful disobedience.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act by Charles W. Kuntz, to recover compensation for personal injuries, opposed by the Peru Basket Company, employer. Compensation was awarded by the Industrial Board, and the employer appeals. Affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellant.
Joseph A. Faust, for appellee.

DAUSMAN, C. J. Appellee filed his application for an award of compensation. Appellant filed answer in denial and also a special answer, in which it alleged willful misconduct. The following is a portion of the finding of facts:

* Decision rendered, March 6, 1919. 122 N. E. Rep. 349.

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"And the full board heard the argument of defendant's counsel, and, having reviewed the evidence and being duly advised in the premises, finds that on the 26th day of February, 1918, plaintiff was in the employment of the defendant at an average weekly wage of $9.62; that at said time the plaintiff was employed as an off-bearer upon a chopping machine, which is a machine with a blade 78 inches long and was being used for the purpose of cutting timber into small strips for basket rims; that when the strips were cut off by the knife they dropped into a rack, and when sufficient strips had dropped into the rack to make a bundle, it was the duty of the plaintiff to lift them out and bind them by wire; that on the day of the injury and prior thereto the plaintiff's eyesight was defective as a result of a stroke of paralysis, the muscles controlling his eyeballs being paralyzed and the eyeballs remaining stationary and not moving; that the defendant had full knowledge of the condition of the plaintiff's eyesight on the date of the injury and prior thereto; that the knife with which said strips are cut from the timber is guarded by a board, and the defendant by a proper representative had instructed the plaintiff not to place his hands near the knife in removing the strips from the rack; that immediately prior to the accident the chopping machine was not in motion, and was not in motion at the time the plaintiff put his hand in to take out the bundle of strips; that while the plaintiff was in the act of removing the bundle the operator of the chopping machine started the same, and because of the plaintiff's defective eyesight the plaintiff inadvertently placed his left hand under the board guard, and the knife caught and severed one-half of the distal phalanx of the index finger and the whole of the first phalanx of the second, third, and fourth fingers; that the plaintiff had some infection of the wound; that said injury has resulted in such permanent partial impairment of the plaintiff's left hand as will entitle him to 60 weeeks' compensation; that the plaintiff did not willfully, deliberately, or intentionally place his hand too near the knife of the chopping machine, but he did do so unintentionally, inadvertently, and because of his defective eyesight."

[1] Appellant contends: (1) That the injury did not arise out of the employment, because of the workman's failure to obey instructions; and (2) that the workman's failure to obey instructions amounts to willful misconduct. The first contention cannot be sustained. The fact that a workman, at the time he receives an injury, is acting in violation of directions given him by his employer does not preclude the injury from arising out of the employment. The effect of a failure to obey instructions must be considered under section 8 of the Workmen's Compensation Act (Laws 1915, c. 106). National Car Coupler Co. v. Marr. 121 N. E. 545; Great Lakes, etc., v. Cellatto (Jan. 1919) 122 N. E. —.

[2] The second contention presents a question of fact, viz.; Was the workman's failure to follow the direction given him a willful disobedience? There is no conflict in the evidence. The workman was directed by appellant's superintendent never to put his hands under the guard and then upward (back of the guard) above a certain point. With that direction the workman failed to comply, and thereby received his injury. In explanation of his conduct the workman testified:

"I was off-bearing, and was getting down some No. 2 basket rims to tie into a bundle. I got my hand a little bit too high and got it into the knife. The machine was standing still; but the man who operated it pulled the lever and started it The superintendent had pointed out to me a certain point above which I was not to put my hand. When the strips are cut by the knife they drop down. But there is a little ledge at the side of the knife, and sometimes they stop there and don't fall down. At the time I was hurt I was reaching to get the strips from the ledge. I had a paralytic stroke two years ago, and I can't move the eyeballs I reached too high by misjudging the distance. On account of the condition of my eyes I see double objects. When the machine was not in

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operation it was impossible for me to get my hand under the knife. The superintendent did not instruct me not to reach up there when the machine was not in operation."

Appellant's superintendent testified that he knew when he employed appellee that his eyes were "set," that the accident could have resulted from bad eyesight, the workman being nearer the machine than he thought, and that he did not think that the workman willfully put his hand up under the knife.

The evidence tends fairly to sustain the finding throughout. The award is affirmed; and, by virtue of the statute, the amount thereof is increased 5 per cent.

SUPREME COURT OF KANSAS.

BENSON

v.

BUSH. (No. 21883.)*

1. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE."

The plaintiff, as station agent of the defendant, was not, while attemping to start a fire in the depot stove, engaged in "interstate commerce."

(For other cases, see Commerce, Dec. Dig. § 27[5].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DANGER WITHIN EMPLOYMENT.

His attempt to start a fire by the use of kerosene, which he supposed was signal oil, did not thereby add to his employment any peril outside thereof.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

3. MASTER AND SERVANT—INJURY TO SERVANT—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

The injury arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942).

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

(*Additional Syllabus by Editorial Staff.*)

4. COMMERCE—EMPLOYMENT IN "INTERSTATE COMMERCE."

For a railroad employee to come under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) it must appear that the injury was incurred while he himself was employed in interstate commerce; that his

* Decision rendered, Feb. 14, 1919. 178 Pac. Rep. 747. Syllabus by the Court.

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work at the time must have had a real and substantial connection with interstate commerce.

(For other cases, see Commerce, Dec. Dig. § 27[5].)

Appeal from District Court, Sedgwick County.

Action under the Workmen's Compensation Act by C. H. Benson against B. F. Bush, receiver of the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Waggener, of Atchison, O. H. Bentley, of Wichita, and G. L. De Lacy and W. E. Brown, both of Atchison, for appellant.

Adams & Adams and S. S. Hawks, all of Wichita, for appellee.

WEST, J. The defendant appeals from a judgment in favor of the plaintiff for injuries caused by burns received in attempting to start a fire in the depot where the plaintiff was employed. The action was under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942).

At the station of Ray, in Pawnee county, the plaintiff began work as agent, and in trying to start a fire with what he supposed was signal oil, which turned out to be kerosene, he was burned. The answer alleged that, if the plaintiff was injured, it was not by reason of any accident arising out of and in the course of his employment, but was due to the explosion of a can of kerosene which he himself poured upon live coals, and that he was injured because of the new and added peril caused thereby, to which he caressly exposed himself, and that the act was outside of his employment. It was further alleged that the injury occurred while the plaintiff was employed by the defendant in interstate commerce, and that his remedy, if any, was under the federal Employers' Liability Act, of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. §§ 8657-8665]).

The court instructed that the injury was an accident that occurred in the course of plaintiff's employment, but that it remained for them to determine whether it arose out of the employment, which they were told meant that the accident was in some sense due to the employment and resulted from an accident or risk reasonably incident to that employment, and a risk which might have been contemplated by a reasonable person entering the employment, as incidental to it; that, if the injury was due to an act of the plaintiff which added a new or additional risk to his employment, he could not recover. The jury were also instructed that the question of whether the plaintiff and defendant were engaged in interstate commerce as a defense was not before them for their consideration.

They answered special questions to the effect that the plaintiff was not injured by pouring kerosene on the fire or on live coals; that the explosion was cased by fire from a lighted match coming in contact with explosive matter; that the liquid in the can which the plaintiff poured in the stove was kerosene; that a former agent furnished the kerosene; that the defendant had a rule forbidding its use in starting fires in stations, which rule was in the station at Ray, but the plaintiff did not know of its existence before his injury; that the defendant checked to the plaintiff as agent the cans in the depot, the contents of one of which was afterwards used by him in attempting to light the fire.

[1, 4] The defendant argues that, as Ray was a station on an interstate line of railroad where the duty of the agent was to sell tickets to points in and out of the state and to handle state and interstate freight, he was engaged in interstate commerce; that his injury did not arise out of it and in the course of his employment, but from the new and added peril caused by the method he himself chose to do his work; that when the defendant had provided kerosene for lights and made a rule prohibit-

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ing its use in starting fires, and the agent nevertheless used it for that purpose, he thereby added a new peril to his work, which cannot be said to have arisen out of his employment.

In order for the plaintiff to come under the Employer's Liability Act it must appear that the injury was incurred while he himself was employed in interstate commerce; that his work at the time must have had a real and substantial connection with interstate commerce. Barker v. Railway Co., 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121; Thornbro v. Railway Co., 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1915D, 314; Thornboro v. Railway Co., 92 Kan. 681, 142 Pac. 250; Bumstead v. Railway Co., 99 Kan. 589, 162 Pac. 347, L. R. A. 1917E, 734, and cases cited.

It has twice been said that the test is:

"Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941.

The plaintiff was checked in on the 16th of November, 1916. The next morning he started to build a fire, and the accident occurred. He testified that he did not know whether he could sell a ticket to a point outside the state or not, and did not know that he had such tickets to be filled out, and if a person had come to buy an interstate ticket he would have had to get information.

The mere fact that the station was on an interstate road did not render plaintiff at the time a person engaged in interstate commerce. He had been working the evening before on some statements which compared the company's state and interstate business to the year before, but in the morning when starting the fire he was not thus engaged. Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057; Ann. Cas. 1918B, 662, is cited as authority for holding the plaintiff to have been engaged in interstate commerce. Van Deventer, J., speaking for the court, said:

"In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. * * * Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury, his employment was in both."

There the employee had actually been doing state and interstate work, while here the only work the plaintiff had done on the day in question was state work. True, his employment or the scope of duty which he might be called on to do included both, but he had not on the day in question done any interstate work, and he was doing none when injured, nor was he going to or returning from duties of both kinds.

In Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the employee was removing coal from storage tracks to coal chutes, which coal had been previously brought from another state and had been on hand a week or more. It was said not to be important whether Harrington had been or contemplated being engaged in interstate work. He was not so engaged at the time of the injury, and it was held that he could not recover. This decision was rendered in 1916. The Winfield Case was decided in 1917.

In 1918 Southern Ry. Co. v. Pitchford was decided by the Fourth Circuit Court of Appeals, 253 Fed. 736. Pitchord was at work in the defendant's yards, whither came cars, both state and interstate, and were there kept until needed. His duty was to clean and ice the cars

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and keep the yards free from papers and other refuse. Every morning a delivery of several thousand pounds of ice was made at the yards, whereupon the employee, with others, would load a push car and from it take the ice and put in the cars as needed. On the day of the injury he had finished cleaning a car and had begun cleaning the yard when he heard a call that the ice had come. He went to the push car to aid in putting it on the track. While waiting by the belt line track for other employees to come, he turned to look at an engine approaching on the main track and was struck by a switch engine running rapidly on the belt line track. The cars which he would in due course have iced were interstate cars. It was held that at the time of the injury he was not engaged in interstate commerce or in work so closely connected therewith as to be practically a part of it. The case was said to be governed by the same rule as the Harrington Case. This is the latest federal decision we have found, and, considering the analogy of the case before us, and the dissimilarity of the Winfield Case, it is held that the plaintiff was not within the federal Employers' Liability Act.

[2, 3] The most natural thing for a station agent to do is to make a fire in the stove when the weather is cold, and, notwithstanding the dangers and prohibitions, everybody knows that folks will start fires with coal oil. It appeared in this case that the agents generally used signal oil or kerosene in starting fires in that locality. The plaintiff testified:

"It was the custom of the agents to do that. All that I have ever known. I have known a majority of them along that special division."

The very fact that the defendant had a rule against using kerosene to start fires indicates a knowledge that such warning was needed, which is another way of saying that it indicated consciousness of the agents' custom to use coal oil for kindling.

The trial court correctly instructed that the injury occurred in the course of the employment and the jury were warranted in finding that it arose out of such employment.

In Stuart v. Kansas City, 102 Kan. 307, 171 Pac. 913, an employee was injured by having mortar playfully or wantonly thrown into his eye by a fellow workman, and this was held to be an injury arising out of and in the course of his employment. See, also, White v. Stockyards Co., 177 Pac. 522.

The Corpus Juris treatise on the Workmen's Compensation Act thus states the rule:

"A peril which arises from the negligent or reckless manner in which an employee does the work which he is employed to do may, in many cases, be held to be a risk incidental to the employment; and the same is true where he performs an authorized act in a forbidden manner, a distinction being taken in this regard from cases in which the act is altogether outside of, and unconnected with, the employment." Page 75.

In support of the text that a new and added peril to which the employee has needlessly exposed himself is not within the act, the author cites the case of a messenger boy jumping on a moving street car; a miner riding in an empty tub contrary to orders; a workman walking across a railway contrary to orders instead of crossing by bridge.

The annotated case of Lancashire & Yorkshire Ry. v. Highly, 15 N. C. C. A. 210, decided by Lords Finlay, Haldane, Dunedin, Atkinson, and Sumner in March, 1917, involved the question whether the death of a workman caused by attempting to go between the trucks of a "goods train" arose out of his employment. It was held that it did not so arise. The county court judge held the employer not liable. The court of appeal reversed this ruling. When the case reached the court of last resort and was argued, "their lordship took time to consider their judgment."

Viscount Haldane in his opinion said that for the injury to be due

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arising out of and in the course of the employment it must be shown that two conditions had been satisfied.

"The injury by accident must have occurred as something which would not have occurred but for the circumstance of the employment and as having been something due to it—the employment— and it must have occurred during its currency." Page 244.

Lord Summer said one test:

"Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

The case was said to be one of an—

"accident arising not out of, but outside of the employment, since at the time of his death the workman was in no sense doing that which was part of or fell within his employment, whether he was or was not acting with care therein, but was for his own purpose, namely, the convenience of the moment, thoughtlessly pursuing a course which fell outside of his employment." Page 293.

It is quite clear from all the five opinions that the case was not regarded or treated as one of merely negligent manner of doing some act clearly within the line of employment, but as one involving a voluntary and needless choice of a dangerous route of travel when safe ones were available, thereby momentarily taking the workman outside of the line of his employment.

Here the agent was rightfully and properly attempting to start a fire, but carelessly used the wrong kind of kindling. This was not a conscious, voluntary choice between a safe and a dangerous way to do his duty, but a careless use of a combustible, which careless use endangered his life and seriously injured him, but just such a careless use as was frequently made of kerosene by the station agents of the defendant and such a use as might be likely to result from the employment.

While the facts place the case before us very near the border line, there is sufficient in the record to justify the conclusions reached by the trial court.

The judgment is affirmed.

All the Justices concurring.

SUPREME COURT OF KANSAS.

UNRINE

v.

SALINA NORTHERN R. CO. ET AL. (No. 21915.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—OPERATION OF RAILROADS UNDER THE ACT—PRESUMPTION.

Receivers of a railroad company are presumed to be operating under the Workmen's Compensation Act until they elect not to come within its provisions, although before their appointment the corporation had made such an election.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

* Decision rendered, Feb. 8, 1919. 178 Pac. Rep. 614. Syllabus by the Court.

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(Additional Syllabus by Editorial Staff.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—RECEIVERS OF RAILROADS—"EMPLOYER."

Receivers of railroad companies are "employers" within Workmen's Compensation Act, Laws 1917, c. 226, § 2, subd. h.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employer.)

Appeal from District Court, Saline County.

Action by Matt Unrine against the Salina Northern Railroad Company and others. Demurrer to one defense of answer sustained, and defendants appeal. Affirmed.

David Ritchie, of Salina, for appellants.

Arthur F. McCarthy, of Salina, for appellee.

BURCH, J. The action was one to recover compensation for personal injuries. A demurrer was sustained to one defense of the answer of the receivers, and they appeal.

In July, 1917, the defendants Brent and Goebel were appointed receivers for the Salina Northern Railroad Company. The injury complained of occurred on September 25, 1917. The answer of the receivers was that in January, 1916, the railroad company had elected not to accept the provisions of the Workmen's Compensation Act.

[1, 2] The demurrer was properly sustained. When the receivers took charge of the property and affairs of the railroad company, they did so as appointees and agents of the court instituting the receivership, and not as appointees and agents of the corporation. Contracts between the corporation and employees who were retained in service by the receivers were terminated, and such employees became employees of the receivers. Chilletti v. Railway Co., 102 Kan. 297, 171 Pac. 14, L. R. A. 1918C, 1147. The receivers were an "employer," within the provisions of the Workmen's Compensation Act (Laws 1917, ch. 226, § 2, subdiv. h). As such, they formulated their own business policies. Until they elect not to come within the provisions of the act, they are presumed to be operating under it, without regard to the previous attitude and conduct of the corporation with respect to the same subject.

The judgment of the district court is affirmed.

All the Justices concurring.

COURT OF APPEALS OF KENTUCKY.

PENN ET AL.

v.

PENN.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENT.

Under Workmen's Compensation Act, a father, partially dependent upon wages of deceased son, could participate in compensation allowed,

*Decision rendered, Feb. 11, 1919. 209 S. W. Rep. 53.

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though son left totally dependent widow; father being entitled to part of award proportionate to his part of total contribution to support of father and wife made by son.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Circuit Court, Mason County.

Proceeding under the Workmen's Compensation Act by Nellie Penn and another for compensation for the death of Harvey Penn, her husband, employed by the Bates & Rogers Construction Company. Compensation was awarded, the Board of Compensation deciding that James Penn, decedent's partially dependent father, was not entitled to participate with the totally dependent widow, which award was reversed by the circuit court, and the widow and others appeal. Affirmed.

Charles H. Morris, Atty. Gen. D. M. Howerton, Asst. Atty. Gen., Stanley Reed, of Maysville, and Chambers Baird, of Ripley, Ohio, for appellants.

A. D. Cole and H. W. Cole, both of Maysville, for appellee.

SAMPSON, J. A young man named Harvey Penn, employed by the Bates & Rogers Construction Company in the work of building a lock and dam on the Ohio river, was accidentally killed in the course of his employment. For some years previous only he and his father lived together, and his father was partly dependent on the son for support. His mother was dead, and he had no other close relatives. About one month before the accident to and death of young Penn, he married. The Bates & Rogers Construction Company was operating under the Workmen's Compensation Act (Ky. St. Supp. 1918, §§ 4880-4987) and carried insurance. Both the construction company and the insurance company recognize liability for compensation to dependents of decedent, Penn; but the two dependents—the widow, Nellie Penn, and the father, James Penn—are litigating the question of what, if any, apportionment of the amount allowed under the act shall be made between the two. The widow, by the terms of the statute, is presumed to be wholly dependent upon the earnings of the husband, and this is not contested. The father, who resided in the house with the deceased, is admitted to be partially dependent. The widow aserts that, as she is the only totally dependent person on the deceased employee, she is entitled to full compensation to the exclusion of the father, who was only partly dependent on his son. She says that the whole excludes the idea of a division or apportionment; that the wholly dependent, if any there be, takes the whole compensation; that one only partly dependent is not entitled to participate in the compensation allowed, so long as there is one of the totally dependent class.

Can a person partly dependent upon the wages of a deceased employee participate in the compensation allowed under this act, when there is a totally dependent claimant? That is the question for determination in this case. The lower court held that the partially dependent father was entitled to participate with the totally dependant wife in the award in the proportion that his dependency bore to total dependency. The Board of Compensation held to the contrary. The widow prosecutes this appeal.

The extent of the liability of the employer to dependents of a deceased employee is fixed, according to the class of dependents to which the claimant belongs, by section 4893 Kentucky Statutes, which reads:

"(1) If there are no dependents, as herein defined, there shall be paid in addition to the burial expenses and medical expenses, if any otherwise provided for herein, the further sum of $100, payment to be made to the personal representative of the deceased employee.

"(2) If there are one or more wholly dependent persons, 65% of the

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average weekly earnings of the deceased employee, but not to exceed $12 nor less than $5 per week shall be payable, all such payments to be made for the period between the date of death and 335 weeks after the date of accident to the employee, or until the intervening termination of dependency, but in no case to exceed the maximum sum of $4,000.

"(3) If there are partly dependent persons, the payments shall be such part of what would be payable for total dependency as the partial dependency existing at the time of the accident to the employee may be proportionate to total dependency, all such payments to be made for the period between the date of death and 335 weeks after the date of the accident to the deceased employee, or until the intervening termination of dependency, but in no case to exceed in the aggregate of compensation on account of such death the maximum sum of $4,000."

Subsections 2 and 3 are the ones with which we are concerned. Simplified, subsection 2 provides that, in case where there are one or more wholly dependent persons, the company shall be liable for 65% of the average weekly earnings of the deceased employee; and subsection 3 provides that, if there be no totally dependent persons, the amount recoverable shall be only such part of what would be payable for total dependency as the partial dependency, existing at the time of the accident to the employee, may be proportionate to total dependency. This section fixes the amount for which the insurer is liable, and does not designate the dependents who are to receive the same, for it will be noted that the section does not say to whom the compensation shall be paid as between dependents, but only that 65% of the average weekly wage of the deceased employee "shall be payable"; that is, the company shall be liable for said amount when fixed by the board.

It has often been held that, where there are two or more wholly dependent persons, the allowance shall be equally distributed between them. Rossi v. Standard Oil Co., 2 Cal. I. A. C. Dec. 307; Moran v. Rodgers & Hagerty, Inc., 180 App. Div. 821, 168 N. Y. Supp. 410; Buhse v. Whitehead & Kales Iron Works, 194 Mich. 413, 160 N. W. 557. So, also, has it been decided that where there are several partially dependent persons, but no totally dependent, each shall share in the fund awarded in the proportion that his partial dependency bears to total dependency and the distributable fund, but, no matter how large the number of dependents, the total sum of their dependency cannot exceed 65% of the average weekly earnings of the deceased employee. Anderson v. American Straw Board Co., 1 Conn. Comp. Dec. 11 (affirmed by Superior Court); State ex rel. Ernest Fleckenstein Brewing Co. v District Court, Rice County, 134 Minn. 324, 159 N. W. 755; In re Pagnoni, 230 Mass. 9, 118 N. E. 948; Dosker's Compensation Law (1917 Ed.) §§ 164-181.

The act contains a provision (section 4909, Kentucky Statutes) for the payment of the entire award to one dependent for the benefit of all dependents entitled thereto, if the board so directs. This is intended to cover cases where a parent and a child or children are dependents. Generally the board will direct that all payments be made to the parent, for the use and benefit of the parent and the several dependent children in accordance to the dependency of each and their respective claims on the deceased for support. However, it has been held by the New Jersey court that where the deceased employee left a wife and several minor children all totally dependent upon him for support, and one of the dependent children was by a former wife, the whole amount should not be paid to the widow, but it should be divided, and paid, one part to the widow for her use and that of her own children, and the balance to the guardian of the stepchild, according to the dependency of each; it being made to appear that the best interest of the stepchild would thus be served.

Why, then, should not the partially dependent share proportionately wth the totally dependent in the ratio of his dependency to total dependency? We think he should. If this is not allowed, the legislative pur-

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pose fails in large part. The reason is not far to seek. The legislation out of which this system arose is founded upon the idea that all loss or depreciation of man power, like that of machine or material, must be charged to the industry in which it occurs, as a part of the cost of production, and the loss distributed to and absorbed by the community as the ultimate consumer of the product of the enterprise. If a machine is worn out or broken, it is properly charged as a part of the cost of production, and those who buy and use the product of the factory, or other plant, distribute and absorb the commercial shock. Why should not the same process be pursued with respect to the depreciation or destruction of the man power employed in the same plant? Why make the unfortunate man bear all the burden of the accident, when he is a victim of circumstances and conditions over which he has little control?

The underlying purpose of the system is to provide support and maintenance for those who were dependent totally or partially, upon the deceased employee, and thus save them from want, and the public from a charge. Dosker's Compensation Law, § 164. If the employee was, in his lifetime, contributing to the support of more than one dependent of different degrees, why should his death work a preference in favor of one or of a single class to the exclusion of all others, provided they all come within one or the other of the classes named in the act? To so hold would often work great hardship, where the dependent, though included in subsection 3, was in fact 90 per cent. or more, dependent, but not wholly so. Moreover, it would often, as in this case, give the sole total dependent much more than she received in the lifetime of the earner. The widow in this case would receive more from compensation, under the act, than from decedent's earnings, while taking from the partial dependent the little he formerly enjoyed. This was never intended. But, if dependents be allowed to share in the award made by the board in the proportion of their dependency, the cardinal purpose of the act will be fulfilled, while no violence will be done to the letter thereof.

Unless the statute expressly provides otherwise, partially dependent persons may participate in the award with total dependents. Corpus Juris, Workmen's Compensation Acts, Supplement, page 56; Robinson v. Anon., 6 W. C. C. 117; Boyd on Workmen's Compensation, § 498. The text of our statute does not provide otherwise, but rather, when the whole act is considered together, fosters the idea that the two classes of dependents shall share in the benefits at the same time and in proportion to their dependency; and this appears to be, not only a sound rule, but the fair and just one.

The compensation allowed to several partial dependents should be in proportion to the degree of dependency of each to total dependency, and where there are both total and partial dependents the award should be distributed in the same ratio, upon the average, employed by the deceased employee; that is to say, if the deceased was earning $10 per week, and used 35 per cent., or $3.50 of it, to support himself, there was left, as now, 65 per cent. of his weekly wage, which was distributed between the dependents. He had a totally dependent wife and a partially dependent father; he gave to the wife for her support $4, and to his father $2.50. Should the ratio now be changed simply because of the death of the earner? Is there any sound reason why the father should be wholly cut off from support, when fund available is practically the same? We can find none.

The board should award compensation in the ratio of dependency, whether there be partial dependents only, or some totally and others only partially dependent. The judgment of the trial court, allowing compensation to the partially dependent father and remanding the cause to the Board of Compensation to ascertain and fix the degree of dependency of the father, and to apportion the award between the two dependents, is affirmed.

Judgment affirmed.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

NORFOLK.

FRIER'S CASE.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—KNOWLEDGE OF INJURY—TIME.

Knowledge of employee's injury on part of employer, under Workmen's Compensation Act, pt. 2, § 18, is substitute for written notice required by section 15, and employer must have knowledge within time when written notice should have been given; that is, as soon as practicable.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OR KNOWLEDGE OF INJURY.

Fact that subscriber to Workmen's Compensation Act did not give notice to its employee that it was insured under act (part 4, § 21), and that he did not have knowledge of insurance until some months subsequent to injury, had no effect on his rights in relation to giving notice of injury, or claiming excuse therefrom because employer had knowledge of injury, and no effect upon finding of Industrial Accident Board.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF FINDING.

Where it cannot be said that finding of Industrial Accident Board that subscriber or its agent did not have knowledge of injury to employee as soon as practicable after occurrence was not warranted as matter of law, it must stand on appeal from decree of superior court affirming denial of compensation.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Norfolk County.

Proceeding for compensation for injury by Adolphus S. Frier, opposed by the inhabitants of the town of Randolph, the employer, and the Travelers' Insurance Company, the insurer. Compensation was denied, the denial affirmed by the superior court, and the employee claims appeal. Decree of the superior court affirmed.

Michael J. Daly, of Randolph, for appellant.

Walter I. Badger and Louis C. Doyle, both of Boston, for appellee.

CROSBY, J. The employee, Adolphus S. Frier, while in the employ of the town of Randolph as janitor of a school building, was injured on two occasions. His first injury occurred on May 19, 1916, and the second on December 4, 1916. The member of the Industrial Accident Board who heard the cases found that no claim for compensation was ever filed for the first injury. The statute requires that proceedings under the act shall not be maintained unless a claim therefor has been made in writing in accordance with St. 1911, c. 751, pt. 2, § 15, and section 23, as amended by St. 1912, c. 571, § 5.

[1] As to the second injury the member of the board found that it

* Decision rendered, Feb. 26, 1919. 122 N. E. Rep. 195.

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arose out of and in the course of the claimant's employment; that a claim was filed within the statutory period; that while no notice of the injury was given as provided by St. 1911, c. 751, pt. 2, §§ 15, 16, 17, and 18, the town had knowledge of the injury and "therefore, the fact that the employee failed to give notice in writing * * * is not a bar to these proceedings." Section 18. This finding is based upon the fact that the chairman of the school committee of the town filed with the board reports of the employee's injuries, copies of which are annexed to the record. The report of the injury of May 19, 1916, was filed on May 9, 1917, and that of the injury of December 4, 1916, was filed on May 7, 1917; both reports are dated May 7, 1917.

No new evidence being presented (the report of the member containing all the material evidence), the board on review found:

"That the employee is not entitled to maintain these proceedings [as to either injury] because notice of the injuries was not given, as required by part 2, § 15, and that, in lieu thereof, the subscribers or their agent, did not have knowledge of such injuries as soon as practicable after their occurrence. Therefore, the employee is not entitled to compensation under the act."

While it is plain that the reports filed would well warrant a finding that the town had knowledge of the injuries at least as early as May 9, 1917, it does not follow that "the association, subscriber or agent" had such knowledge as takes the place of want of notice under section 18 of the act. The written notice of the injury which the statute requires under section 15 must be given "as soon as practicable after the happening thereof." The knowledge which the subscriber has under section 18 must have been acquired within the time limited for the giving of notice under section 15; in other words, such knowledge must be had as soon as practicable after the employee is injured. In Brown's Case, 228 Mass. 31, it was said at page 37, 116 N. E. 897, at page 898:

"Knowledge on the part of the employer is a substitute for the written notice required by St. 1911, c. 751, pt. 2, § 15, and the employer must have knowledge within the time when written notice should have been given, namely 'as soon as practicable after the happening' of the injury. Jeremiah Murphy's Case, 226 Mass. 60 [115 N. E. 40]."

[2] The fact that the subscriber did not give notice to the employer that it was insured under the act (part 4, § 21), and that he did not have knowledge of that fact until on or about February 27, 1917, has no effect upon his rights or upon the finding of the board. Young's Case, 218 Mass. 346, 106 N. E. 1.

[3] It cannot be said the finding that the subscriber or its agent "did not have knowledge of the injuries as soon as practicable after their occurrence," was unwarranted as matter of law; accordingly, it must stand. The entry must be

Decree affirmed.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

BERMAN'S CASE.

IN RE GULF REFINING CO.

IN RE TRAVELERS, INS. CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—QUESTION OF FACT—DECISION OF INDUSTRIAL ACCIDENT BOARD.

Whether physical ailments of female employee had any causal connection with fall from swivel chair in which she was sitting in course of employment was a question of fact, decision of which was wholly for the industrial board, whose conclusion cannot be reversed.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Suffolk County.

Petition by Theresa D. Berman, the employee, for compensation for personal injuries under the Workmen's Compensation Act against the Gulf Refining Company, the employer, and the Travelers' Insurance Company, the insurer. The claim for compensation was dismissed, the order of the Industrial Accident Board affirmed by the Superior Court, and, from its decree, the employee appeals. Decree affirmed.

Thos. E. Hamill (Harry Finestone, of Chelsea, on the brief), for employee.

Walter I. Badger and Louis C. Doyle, both of Boston, for Travelers, Ins. Co.

PER CURIAM. The crucial question on this record was whether certain physical ailments of the employee had any causal connection with a fall from a swivel chair in which she was sitting in the course of her employment by a subscriber under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 574). The single member and the industrial accident board found that there was no causal connection. That was a pure question of fact. Its decision was wholly for the board, whose conclusion under these circumstances cannot be reversed. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; McCarthy's Case 231 Mass. 259, 120 N. E. 852.

Decree affirmed.

* Decision rendered, March 11, 1919. 122 N. E. Rep. 395.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

CRANNEY'S CASE.

IN RE HOTEL ESSEX.

IN RE EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEATH IN "COURSE OF EMPLOYMENT"—KILLING OF HEAD WAITER.

Where head waiter of hotel was killed, while in hotel eating lunch under his contract of employment, by waiter whom he had discharged in interests of hotel company, and acting under its authority, death was in "course of employment," entitling dependent widow to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other defintons, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act (St. 1911 c. 751, amended by St. 1912 c. 571) by Mary E. Cranney, for compensation for the death of Charles W. Cranney, the employee opposed by the Hotel Essex, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was awarded, the award affirmed by the superior court, and the employer and insurer appeal. Decree of the superior court affirmed.

Sawyer, Hardy, Stone & Morrison, of Bosston (Gay Gleason, of Boston, of counsel), for appellant insurer.

Jas. H. Cline, of Boston, for appellee.

BRALEY, J. The case was heard in the first instance by a single member whose decision for the claimant was affirmed on review by the full board. While the insurer concedes that there was some evidence to support most of the findings of fact, we are satisfied upon reading the evidence, which includes the statement of Zacharachi who shot and killed the employee, that all of the findings were warranted. The findings are as follows:

"The employee * * * was shot and killed on August 28, 1916, by one Stellianos Zacharachi; that the deceased was head waiter at the Hotel Essex and had been such for 2½ years prior to the shooting; that the deceased employee had been employed as a waiter and as head waiter at the hotel for about 16 years; that his duties as head waiter embraced the hiring and discharging of waiters, their control while on duty and the maintenance of discipline among them; that Zacharachi, the assailant, had been employed as a waiter at the hotel for about 20 years; that prior to the claimant's decedent becoming head waiter Zacharachi had enjoyed special privileges not enjoyed by the other waiters; including a special station and shorter hours; that the deceased in the interest of discipline and to allay dissatisfaction among the other waiters and promote the interests of his employers took these privileges away from Zacharachi; that a few weeks before the shooting Zacharachi had been discharged

*Decision rendered, Feb. 26, 1919. 122 N. E. Rep. 266

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because he was not a member of the waiters' union and that immediately prior to the shooting the deceased had voluntarily re-employed Zacharachi, but had not given him his old station; that Zacharachi was of an excitable temperament, was made ugly by drinking liquor; that Zacharachi was a habitual drinker for a long period of years and that he habitually carried a pistol; that his drinking habits and the effect of liquor upon him and the fact that he carried a pistol were generally known at the hotel; that about a month before the shooting a pistol belonging to Zacharachi was taken away from him at the hotel and placed in the custody of the bookkeeper; that on the morning of August 28, 1916, Zacharachi came in to work and did some work; that about 11 a. m. he had some words with the deceased in regard to his work; that he refused to obey the orders of the deceased and was told that he was discharged; that he was very angry and became further inflamed by a couple of drinks which he secured at the hotel bar; that while angry and inflamed by liquor he sought out the deceased employee, had some further words with the deceased in regard to his employment and then shot and killed him; that the shooting occurred while the deceased was eating his luncheon shortly after 2 o'clock; that his luncheon was furnished to him as a part of his contract of employment; that the deceased was free to leave the hotel from 2 o'clock until 5:30 in the afternoon, but that he was subject to call while in the hotel and customarily returned to his place of employment in the dining room after eating his luncheon."

"It was unnecessary to discuss the questions whether the employer knew of Zacharachi's habits in the use of intoxicating liquors or of carrying a pistol, or that drinking caused him to be ugly, as the decision is put on the ground that the employee

"Was shot and killed solely by reason of his performance of his duties as head waiter, and that as it turned out his death resulted from a risk of his employment and flowed from that source as a rational consequence."

The insurer relying on McNicol's Case, 215 Mass 497, 102 N. E. 697, L. R. A. 1916A, 306, contends that compensation cannot be awarded, as the casualty could not have been reasonably foreseen by the employer, and therefore not being a risk of the employment it does not arise out of it. The shooting occurred in the employer's dining room while Cranney was at luncheon. It is manifest that he lost his life, not because of any quarrel of his own with the assailant, but because he faithfully and properly discharged the duty owed to his employer, and thereby incurred the resentment of Zacharachi.

"The servant must serve in the master's way as he is directed, or in emergencies as he has reason to believe the master would approve were he present, or as he a faithful servant owing to his master fealty and aid in time of peril ought."

It was plainly in the employer's interest and for its benefit that Zacharachi should be discharged, and when Cranney was hired and intrusted with this general authority, which he exercised in a reasonable and suitable way, it was contemplated that whatever befell him when acting strictly within the scope of his employment, even if the time and conditions could not be forecast, was incidental to, and part of the employment.

"The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery." Madden's Case, 222 Mass. 487, 495, 111 N. E. 379, 383 (L. R. A. 1916D, 1000).

It moreover is reasonably within the common experience of mankind that the general nature of what Cranney would have to do in maintaining discipline if a waiter persisted in disobeying orders and the possible anger and desire "to get even," of a waiter discharged under such circum-

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stances could be foreseen in the sense that such incidents are not mere figments of the imagination, but incidents which might occur in the ordinary course of human affairs.

"That murder resulted instead of a broken bone is of slight, if indeed it is of any significance. This injury was one to which the employee was exposed by reason of his employment. * * * The causative danger was peculiar to his work. It was incidental to the character of the employment and not independent of the relation of master and servant. Although unforeseen and the consequences of what on this record apears to have been a crime of the highest magnitude, yet now, after the event, it appears to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence. Third by the test in McNicol's Case, 215 Mass. 497, 499 [102 N. E. 697, L. R. A. 1916A, 306], the injury seems to have arisen in the course of the employment." Riethel's Case, 222 Mass. 163, 165, 109 N. E. 951, 952 (L. R. A. 1916A, 304).

We are of opinion that so long as the employee while in the performance of the employer's business properly exercises the authority conferred upon him by his contract of employment, injuries received by him resulting from such employment, arise out of the employment, and if death ensues as in the case at bar his dependents are entitled to compensation. McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Riethel's Case, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A, 304; Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641; Harbroe's Case, 223 Mass. 139, 111 N. E. 709. The decree should be affirmed.

So ordered.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

GAVAGHAN'S CASE.

IN RE EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INCAPACITATED DAUGHTER—RIGHT TO SHARE IN AWARD.

Daughter of deceased servant, over 18, married and living with her blind husband, she herself being totally blind, and therefore physically incapacitated from earning, was entitled to equal share in death benefit with surviving widow, under Workmen's Compensation Act, § 7 (c), as amended by St. 1914, c. 708, § 3 (c).

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act by Lizzie Gavaghan and Anna F. Mason for compensation for the death of Hugh Gavaghan, the employee, wherein the Employers' Liability Assurance Corporation, Limited, acknowledged liability. From a decree of the superior court, affirming denial of her right to participate in the award, Anna F. Mason appeals. Reversed.

* Decision rendered, Feb. 27, 1919. 122 N. E. Rep. 298.

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Frederick S. Harvey, of Lowell, for appellant.
James E. O'Donnell, of Lowell, for widow.

PIERCE, J. The following agreed statement of facts filed in the case contains all the evidence:

"Hugh Gavaghan, late of Lowell, in the county of Middlesex, deceased, the employee, while working at the Tremont & Suffolk Mills in said Lowell, received a personal injury arising out of and in the course of his employment, on the 11th day of December, 1917, from which death resulted on the 15th day of December, 1917. The employee left surviving him a wife by a third marriage, Lizzie Gavaghan, of said Lowell, with whom he was living at the time of his death, and one child, Anna F. Mason, of said Lowell, by a former wife, who was over the age of eighteen years, but who is physically incapacitated from earning by reason of total blindness, and both the said Lizzie Gavaghan and the said Anna F. Mason have filed claims for compensation. The said Anna F. Mason at the time of the death of her father, the said Hugh Gavaghan was married, and was living with her husband, Arthur Mason, of said Lowell, who is also totally blind. The said Lizzie Gavaghan is entitled to compensation as a person who is conclusively presumed to be wholly dependent for support upon the deceased employee, by virtue of paragraph 'a' of section 7 of the Workmen's Compensation Act (St. 1911, c. 751, pt. 2), as amended by section 3 of chapter 708, St. 1914, and the only question raised by this agreed statement of facts is whether the daughter, the said Anna F. Mason, is also a person conclusively presumed to be wholly dependent for support upon the deceased employee by virtue of that part of paragraph 'c' of section 7 of the Workmen's Compensation Act, as amended by section 3 of chapter 708, St. 1914, which provides, among other things:

"'* * * Provided, that in the event of the death of an employee who has at the time of his death living child or children by a former wife or husband, under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), said child, or children shall be conclusively presumed to be wholly dependent for support upon such deceased employee, and the death benefit shall be divided between the surviving wife or husband and all the children of the deceased employee in equal shares, the surviving wife or husband taking the same share as a child.'

"The insurer has acknowledged liability, and is ready and willing to pay compensation when this question of dependency has been decided."

In the case of a child of a former wife or husband the Legislature considers neither the wealth, poverty, residence nor legal rights to support of that child, and concerns itself only with the question is the child under eighteen years of age, and if over, is he or she "physically or mentally incapacitated from earning.' If under eighteen years of age or physically or mentally incapacitated from earning, the child is conclusively presumed by the terms of the act to be wholly dependent for support on the deceased employee. Bott's Case, 230 Mass. 152, 119 N. E. 755; Holmberg's Case, 231 Mass. 144, 120 N. E. 353. Upon the agreed facts the child is physically incapacitated from earning; it follows that the child Anna F. Mason is entitled to an equal share in the death benefit with the surviving widow. St. 1911, c. 751, part 2, § 7 (c), as amended by St. 1914, c. 708, § 3 (c).

Decree reversed.

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SUPREME COURT OF NEW JERSEY.

BURNS

v.

EDISON.*

1. QUÆRE.

Whether an agreement to pay the statutory compensation for death under the Workmen's Compensation Act (P. L. 1911, p. 139, par. 12; P. L. 1913, p. 305; P. L. 1914, p. 499) should be in writing to satisfy the statute of frauds, in view of the provision that compensation is terminated by death of a dependent or remarriage of a widow, quære.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROCEDURE—SUIT TO ENFORCE AGREEMENT TO PAY STIPULATED SUM.

The procedure for recovery of compensation under said act is not applicable to cases where the suit is to enforce the terms of an agreement to pay stipulated sums, made after the accident.

(For other cases, see Master and Servant, Dec. Dig. § 394.)

3. MASTER AND SERVANT—OCCURRENCE OF ACCIDENT—COMPENSATION—ESTOPPEL.

An agreement to pay compensation, made after the accident, is evidential of the occurrence of an accident and of the right to recover compensation therefor, but not conclusive evidence nor an estoppel to disprove the accident, if made within a year thereafter; and in a compensation suit it is error to exclude proof in denial of the occurrence of the accident, simply because of the existence of such an agreement.

(For other cases, see Master and Servant, Dec. Dig. §§ 404, 405[1].)

Proceeding by Esther Burns against Thomas A. Edison for compensation under the Workmen's Compensation Act. To review award for petitioner, defendant brings certiorari. Reversed and remanded for new trial.

Argued November term, 1918, before Parker and Minturn, JJ.

Kalisch & Kalisch, of Newark, for prosecutor.
Arthur B. Seymour, of Orange, for respondent

PARKER, J. The principal difficulty in this case arises out of the fact that though the petition for compensation counted on a fatal accident alleged to have arisen out of and in the course of the employment of petitioner's husband, the proof was confined to an alleged agreement for compensation between petitioner and one Henderson, conceded to have been the authorized agent of the employer, prosecutor. Prosecutor's counsel on the hearing undertook to show by testimony that death had not occurred by reason of any such accident as claimed, but by reason of an occupational disease. The court overruled the offer on the ground that the agreement estopped the employer from showing such facts because it had been accepted and acted on and the statutory year had run, so that (as he held) a claim based purely on the accident was barred. It is not quite

* Decision rendered, Feb. 18, 1919. 105 Atl. Rep. 717. Syllabus by the Court.

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clear whether the award was based on the agreement as a contract or on a right of action under the staute of which the contract was evidential; but the question of limitation was apparently the factor which decided the court in favor of a binding estoppel and led to the exclusion of the evidence. In either event, however, there was harmful error which requires a reversal.

The course of the proceeding was as follows: The petition, filed September 27, 1917, counted on an accident occurring September 2, 1915, over two years previously, and alleged that about October 1, 1915, an agreement had been made between petitioner as widow, in behalf of herself and one child, for a weekly payment of $6.06 during the 300 weeks prescribed in the statute (P. L. 1911, p. 499); that thereunder payments were made for 78 weeks and then ceased; and prayed an award of compensation. The answer set up, in addition to denial of the accident and of the agreement, that the contract if made was one not to be performed within a year, and was not in writing. The finding of the court on the facts was that deceased was at the time in question in the employ of prosecutor, earning $15.15 per week; that he sustained an accident, describing it as in the petition, and that said accident arose out of and in course of his employment; that it resulted fatally; that prosecutor had due notice, etc.; and awarded $6.06 for 300 weeks, less moneys already paid. The award makes no mention at all of any agreement as a basis of recovery.

At the trial the only proof was, in adition to formal matters, that deceased worked for prosecutor at the time of his death; that a claim for compensation was made and an oral agreement entered into for compensation, under which certain payments were made. Petitioner's counsel offered certain letters, which are now claimed to take the agreement out of the statute, and rested, declining to go into proof of the actual occurrence of an accident, frankly stating to the court that it was a question of occupational disease, and it was possible that petitioner could not recover anything, and stating his theory of the case to be that, "The court order compensation paid in accordance with the agreement entered into between the parties." The court demurred to this, but after a considerable colloquy, reached the result already stated on the ground of estoppel, and without specifically ruling either that the recovery could be on the agreement or must be on the proved facts of accident. The formal finding, as we have just said, is predicated solely on the accident.

[1] We do not find it necessary to decide the rather interesting question whether the statute of frauds is operative. The letters relied on by petitioner as writings to satisfy the statute do no more than indicate inferentially that there is some arrangement between the parties for payment of money, but no terms of such arrangement can be gathered from them. On the other hand, it may be that the complete performance of the contract was not necessarily to be within a year. True, the payments are primarily for 300 weeks; but the act says (paragraph 11) that in case of death of any depedent within that period, or remarriage of a widow, his or her right to compensation shall cease. Hence, if the agreement was to pay according to the requirement of the statute, and not absolutely for 300 weeks, the case might be within the rule in Eiseman v. Schneider, 60 N. J. Law, 291, 37 Atl. 623. As just stated, we do not decide the point.

[2, 3] Taking the theory of a suit purely on the contract, we are of opinion that the court of common pleas could not entertain such a claim under the Cmpensation Act. It was held by the Court of Errors and Appeals, in the very recent case of Holzapfel v. Hoboken Manufacturers' Association, 104 Atl. 209, that an agreement such as that claimed to exist in this case may be sued on in the Supreme Court, and we suppose as a corollary, in any court of ordinary common-law jurisdiction, but necessarily under common-law procedure, including the right of jury trial,

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which is not a feature of the Compensation Act. The only contract supporting a petition under the Compensation Act is that conclusively presumed by the statute from the fact of employment, which is, that in case of accident within the terms of the statute shall be compensation. True, a later agreement to pay is unquestionably evidential of the right to compensation, and has the effect of avoiding the one-year limitation in certain cases. Dupont Powder Co. v. Spocidio, 88 N. J. Eq. 210, 101 Atl. 407. But the right of recovery rests on the contract presumed by the statute to have been made at the time of employment, and often recovery is had not only apart from a later contract but in spite of it. Comp. Act, par. 20; Holzapfel Case, supra.

On the other hand, viewing the case as a suit for compensation under the statute based on proof of accident, as the formal record indicates it was treated, the court clearly erred in excluding proof that no accident had occurred. This of course went to the root of the case; and the estoppel theory is untenable. As we have just seen, the existence of an agreement subsequent to the alleged accident, and within the one-year period, as in this case, voids the limitation. Dupont v. Spocidio, supra; Benjamin & Johnes v. Brabban, 90 N. J. Law, 355, 103 Atl. 688, affirmed 105 Atl. 717. The agreement testified to, so far as concerned the occurrence of an accident arising out of and in the course of employment, was evidential, but nothing more. Like any admission out of court, it could be qualified or contradicted by parol evidence. Wigmore, Ev. § 1058. See Gibbons v. Potter, 30 N. J. Eq. 204; 31 N. J. Eq. 374. If defendant could have shown to the satisfaction of the court, as he offered to do, that no accident in fact occurred as claimed, the defense to a compensation suit would have been perfect, whatever might have been the right of recovery at common law on the agreement as a compromise and settlement of a disputed claim.

The judgment will be reversed, and the cause remanded for a new trial, in order that the essential facts may be determined on proper evidence.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

HOLMES

v.

COMMUNIPAW STEEL CO. ET AL. (TWO CASES).*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS.

A finding of the State Industrial Commission that death of an employee resulted from injuries, when supported by evidence, is conclusive on the courts.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPLICABILITY.

Where a native of New York, employed by a New York corporation, met his death while working for the corporation in New Jersey, *held*

* Decision rendered, March 5, 1919. 174 N. Y. Supp. 772.

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that the New York Workmen's Compensation Act was applicable; it not appearing that it was contemplated that his sole activities should be in New Jersey.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

3. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—PROCEEDINGS.

Though it was improper for the State Industrial Commission to base an award on answers by experts to hypothetical question after the case was adjourned, and on opinions given by the chief medical examiner outside the hearing, such error was waived, where on rehearing the Commission adverted to such evidence, and the employer and insurance carrier made no objection.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

Appeal from State Industrial Commission.

Claim by Charles J. Holmes for compensation under the Workmen's Compensation Law against the Communipaw Steel Company, employer, and the Travelers' Insurance Company, insurance carrier, together with claim for compensation for death by Sophia Holmes, widow of said Charles J. Holmes, against the same employer and insurance carrier. From an award of the Industrial Commission in favor of the claimant widow, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Amos H. Stephens, of New York City (E. C. Shelwood and William B. Davis, both of New York City, of counsel), for appellants.

Herman L. Roth, of New York City, for claimant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., and Robert W. Bonynge, of New York City, of counsel), for State Industrial Commission.

LYON, J. Two questions are presented by this appeal, whether the death resulted from the injury, and whether the Workmen's Compensation Act (Consol. Laws, c. 67) of New York state is applicable.

The deceased was a house smith. His employer was the Communipaw Steel Company. It had an office in New York City and a plant in Brooklyn, N. Y. The deceased resided in New York, was hired in New York, and was paid in New York. The accident occurred while he was working for his employer at the plant of the American Smelting & Refining Company at Maurer, N. J., July 11, 1917. It does not appear that he was hired to work exclusively in the state of New Jersey, and the inference may be drawn that he was hired to work wherever his employer sent him. He was struck on the head by a piece of iron. He returned to work a day or two after the injury, and worked until August 24, 1917. During that time he was depressed, morose, would not talk nor eat, cried at times, and complained of pains in the head. He was taken to Bellevue Hospital, and was committed to Central Islip State Hospital. The commission found that—

"At the time of said accident he was apparently suffering from a constitutional disease of a specific character, and the injuries sustained on July 11, 1917, produced general paralysis, which caused his death December 25, 1917."

[1] Upon the trial there was much conflicting medical testimony given as to the cause of the death. It resolved itself mainly into the question whether the pathologists' findings were more conclusive and competent that an opinion based on clinical diagnosis. The presumption

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is that the claim is within the provisions of the statute. The conclusion reached was that the precipitating cause was an injury from the blow which hastened death. The finding was sustained by the evidence, and is conclusive upon us. McCahill v. N. Y. Transportation Co., 201 N. Y. 221, 94 N. E. 616, 48 L. R. A. (N. S.) 131, Ann. Cas. 1912A, 961; Banks v. Adams Express Co., 221 N. Y. 606, 117 N. E. 1060; Van Keuren v. Dwight, Divine & Sons, 222 N. Y. 648, 119 N. E. 1083.

[2] The case of Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, is decisive of the question of applicability of the New York statute. In that case the employer had an office and plant in this state; the claimant was a resident of the state employed in the state, and sent by his employer to perform sheet metal work in the state of New Jersey.

The award should be affirmed. All concur.

JOHN M. KELLOGG, P. J. [3] The award seems to be based upon answers given by experts to hypothetical questions after the case was adjourned and upon opinions given by the chief medical examiner outside of the hearing. The hypothetical question embraced certain material matters not covered by the statements of the experts at the trial. Such practice is irregular, and denied to the employer the hearing contemplated by the law. We would therefore favor a reversal of the award, except for the following reason: Upon the last rehearing the commission stated the facts referred to and filed the answers of the experts as a part of their proceeding. This method of procedure was not objected to by the appellants. They did not ask that the chief medical examiner or the experts be produced for examination. We conclude, therefore, that the question was waived, and thereafter furnished no ground for reversal.

The award is affirmed.

SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

MULLER

v.

H. & A. COHEN, INC., ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES "ARISING OUT OF EMPLOYMENT."

Where the superintendent of an apartment house was injured by an assault committed upon him by a tenant of the building, as the result of a quarrel arising from insults offered the tenant's wife, the injury did not occur in the line of claimant's duty; assaults being accidents "arising out of the employment" only when the employee is engaged in his master's business.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

*Decision rendered, March 5, 1919. 174 N. Y. Supp. 736.

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Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by John Muller to recover compensation for personal injuries, opposed by H. & A. Cohen, Incorporated, employer, and the United States Casualty Company, insurance carrier. Compensation was denied by the State Industrial Commission, and claimant appeals. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

Peter B. Begg, of New York City, for appellant.

William H. Hotchkiss, of New York City, for respondent.

Charles D. Newton, Atty. Gen., and Robert W. Bonynge, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

LYON, J. The vital question in this case, is whether the injury was induced by the acts of the employee in the line of his duty, or outside it.

The claimant was the superintendent of an apartment house in the city of New York. An assault was committed upon him by a tenant of the building. The superintendent's version of the affair was that the tenant asked him for a key to the front door, and that the superintendent told him that he had nothing to do with the keys, and with an oath the tenant struck him in the face. The claim of the tenant is that the evening of the day before the assault the superintendent had gone to the tenant's rooms, and in the absence of the tenant had inquired of the tenant's wife where her husband was working, when he would be home, and what time he left in the morning. The wife, considering, the questions insulting, did not answer them, and the superintendent, after talking about the fixtures of the room, left. The wife told her husband about the visit of the superintendent and the next morning the husband met the superintendent on the stairs, and asked him why he went to his wife and asked 50 cents for the key—why should he not have come to him. The superintendent said to him, "Get out; I have no key; the boss has the key;" and, wth those words, hit the tenant upon the wrist with a stick which he had in his hand. Thereupon the tenant struck him in the face. He fell upon the iron railing, resulting in an increase of a small hernia. These, in short, are the two versions of the assault.

Under the testimony in the case, the credibility of the witnesses was a question of fact for the determination of the commission. They evidently believed the version of the assault given by the tenant. Nor could we say, if the matter were for our decision, that, in view of the final testimony given before the commissioners, their judgment was not correct. Assaults are accidents arising out of the employment, within the meaning of the Workmen's Compensation Law (Consol. Laws, c. 67), only when the employee is engaged in his master's business. Griffin v. Roberson & Son, 176 App. Div. 6, 162 N. Y. Supp. 313.

The award should be affirmed. All concur.

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SUPREME COURT OF NEW YORK.

APPELLATE DIVISION, THIRD DEPARTMENT.

O'ESAU

v.

E. W. BLISS CO. ET AL.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW —NOTICE.

Though the death of a servant did not occur until nearly two years after an accident, and he failed to file a claim as required, *held* that, under Workmen's Compensation Act, § 28, requiring notice within one year after the accident, or, if death results, within one year after death, the claim of the widow of the servant, filed the day after the death of her husband, is within time.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from State Industrial Commission.

Claim by Martha O'Esau, widow, under the Workmen's Compensation Act, for compensation for herself and child for the death of her husband, John M. O'Esau, against the E. W. Bliss Company, employer, and the Ætna Life Insurance Company, insurance carrier. From an award of the Industrial Commission in favor of claimant, the employer and the insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Lyon, Woodward, Cochrane, and Henry T. Kellogg, JJ.

James B. Henney, of New York City (William H. Foster, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen., E. C. Aiken, Deputy Atty. Gen., and Robert W. Bonynge, of New York City, for State Industrial Commission

JOHN M. KELLOGG, P. J. The employee was injured the 28th day of March, 1916, and died on account of such injuries March 21, 1918. The employee failed to file a claim, as required by section 28 of the Workmen's Compensation Law (Consol. Laws, c. 67). His widow, however, filed a claim for death benefits the day after his death. The fact that he had failed to give notice in a manner which entitled him to compensation does not bar her right to death benefits. By section 28 the right to compensation "shall be forever barred unless within one year after the accident, or if death results therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the commission." This section makes it clear that she is not prejudiced by the fact that he lost his right to compensation by failure to file a claim.

Kelliher v. New York Central Railroad Co., 212 N. Y. 207, 105 N. E. 824, L. R. A. 1915E, 1178, relied upon by the appellants, does not sustain their contention. There it was held that the action was a purely statutory one, and that, by the terms of the statute, the rights to recover against a person for wrongfully or negligently causing a death did not survive after the injured person had permitted the limitation imposed by the statute to expire. The statute we are construing has no such provision, but, upon the contrary, carries a different intent.

The award should be affirmed. All concur.

* Decision rendered, March 5, 1919, 174 N. Y. Supp. 739.

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SUPREME COURT OF NORTH DAKOTA.

KOOFOS

v.

GREAT NORTHERN RY. CO.*

1. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE."

An employee of an interstate railway carrier, who is injured while removing snow from a track over which interstate trains are being run regularly, is engaged in interstate commerce within the meaning of the Employers' Liability Act of Congress of April 22, 1908 (U. S. Comp. St. §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[5].)

Appeal from District Court, Ward County; Leighton, Judge.

Action by Gust Koofos against the Great Northern Railway Company. Judgment for plaintiff, and from an order denying its alternative motion for a judgment notwithstanding the verdict or for a new trial, defendant appeals. Affirmed.

Murphy & Tone, of Grand Forks, for appellant.

McGee & Goss and E. R. Sinkler, all of Minot, for respondent.

CHRISTIANSON, C. J. This is an action for personal injuries, brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]). The case was tried to a jury, which returned a verdict in favor of the plaintiff for $2,295. Judgment was entered pursuant to the verdict, and the defendant appeals from the judgment and the order denying its motion in the alternative for judgment notwithstanding the verdict or for a new trial.

The evidence showed that the plaintiff who at that time was 23 years of age, went to work for the defendant, railway company, about January 19, 1916, as a member of an extra gang employed in shoveling snow and fixing snow fences on the defendant's railroad in Montana. On Sunday, February 7, 1916, the extra gang was at Scobey, Mont. On the evening of that day the foreman requested plaintiff and the other members of the crew to go out and clean the snow out of some cuts between Scobey and Flaxville. While there is some conflict as to the exact degree, it is undisputed that the weather was very cold. The plaintiff testified that the thermometer registered more than 40° below zero, and that there was a blizzard. According to plaintiff's testimony he objected to going out to work that evening owing to the existing weather conditions, whereupon he was assured by the foreman that a warm passenger coach would be taken along in which the workmen could ride to and from work and to which they could retire and warm themselves if it became necessary while they were working; also, that fires would be built along the track; that they would go out only a distance of two or three miles, and would be gone only about two or three hours. The plaintiff testified that he thereupon dressed for work by putting on the same amount and kind of clothing which he had been wearing while engaged in performing similar work for the defendant that winter, and

* Decision rendered, Dec. 21, 1918. 170 N. W. Rep. 859. Syllabus by the Court.

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that he started a fire in the heater in the coach connected with the engine. As they were about to start the foreman informed the plaintiff and other members of the crew that it was unnecessary to take the coach, as they were only going a distance of two or three miles, and would be gone only two or three hours; that the plaintiff and the other members of the crew thereupon in accordance with the directions of the foreman climbed upon the tender of the engine, and that they rode there in traveling to their work. They left Scobey about 8 or 8:30 in the evening, but instead of going a distance of only two or three miles and returning in two or three hours, they continued to move from cut to cut for a distance of from ten to twelve miles, and did not return to Scobey until about, or after, 5 o'clock the following morning. No fires were built along the track. The plaintiff and the other members of the crew from time to time went into the engine cab and warmed themselves. The plaintiff testified that some time after midnight he endeavored to go into the cab for the purpose of warming himself, and informed the foreman that he was getting cold, and that his feet were very cold, and that the foreman prevented him from getting on the engine, and told him, in vile and profane language, to go back to work; that when they started back to town the plaintiff was instructed by the foreman to get upon the tender; that he did so, and rode back to Scobey in that position; that on arriving at Scobey he reported to the foreman that his feet were frozen; and that some four hours later the foreman secured a doctor. It is undisputed that plaintiff froze both of his feet, and that as a result he was confined to his bed in Scobey for four days, and on the fifth was taken to Williston by the defendant and placed in a hospital in that city; that he remained in such hospital for some time; and that the defendant's surgeon amputated two toes on the left foot. The testimony also showed that at the time of the trial both feet were discolored; that the cause of the discoloration was the enlargment of the blood vessels, thereby causing a lack of normal circulation and rendering the feet more susceptible to heat and cold. A physician testified that this condition was permanent.

The plaintiff's testimony is disputed on many points. The foreman specifically denied that he ever promised to take along a heated coach or build fires along the railroad track, but he admits that he stated they would go out only two or three miles, and be gone only for two or three hours. He, however, denied positively that he refused to permit the plaintiff to get on the engine for the purpose of warming himself, or that he used the language which plaintiff claims, or any other abusive language, toward the plaintiff.

[1] Appellant contends that plaintiff was not engaged in interstate commerce within the meaning of the federal Employers' Liability Act. The contention is obviously without merit. The question was not raised in any manner in the court below. And there was no reason for raising it, as the evidence all showed that the passenger trains on the line where plaintiff was employed at the time he sustained his injuries were all interstate trains. Plaintiff was engaged in clearing a track over which an interstate passenger train would leave Scobey the following morning. He was clearly engaged in interstate commerce. Pedersen v. Del., L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Lombardo v. Boston & M. R. Co. (D. C.) 223 Fed. 427; Hardwick v. Wabash R. Co. 181 Mo. App. 156, 168 S. W. 328; Sanders v. Charleston & W. C. R. Co., 97 S. C. 50, 81 S. E. 283; Clark v. Chicago G. W. R. Co., 170 Iowa, 452, 152 N. W. 635; Southern R. Co. v. Puckett, 244, U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69. See, also, Hein v. Great Northern R. Co., 34 N. D. 440, 159 N. W. 14.

Defendant also contends that: (1) Defendant's negligence has not been proven; (2) plaintiff was guilty of contributory negligence; and (3) plaintiff assumed the risk of the injuries. And it is therefore argued

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that the court erred in denying a motion for a directed verdict based upon these grounds.

It is, of course, elementary that negligence, contributory negligence, and assumption of risk are, ordinarily, questions for the jury. They become questions of law only when reasonable men, from the evidence, can draw but one conclusion with respect thereto.

[2, 3] As already stated, this action was brought under the Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. Stat. § 8657]). There is no liability under that act in the absence of negligence on the part of the railroad company or some of its employees. Seaboard A. L. R. Co. v. Horton, 233 U. S. 492, 501, 502, 34 Sup. Ct. 635, 638, 58 L. Ed. 1062, 1069, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Manson v. Great Northern R. Co., 31 N. D. 643, 155 N. W. 32. But by section 3 of the act it is declared that:

"The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." U. S. Comp. St. § 8659.

[4] The statute established the doctrine of comparative negligence, and abolished contributory negligence as a bar to recovery. Contributory negligence is a factor, and may still be shown (except in the case of a violation of a statute enacted for the safety of the employees), but its only effect is to diminish the damages. And in case the employee has by his own negligence contributed to the injury, his damages are to be diminished in proportion to the amount of negligence attributable to the negligent employee as compared with the combined negligence of the employee and the employer. As was said by the United States Supreme Court in Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 121, 122, 33 Sup. Ct. 654, 657, 57 L. Ed. 1096, 1101 (Ann. Cas. 1914C, 172):

"The statutory direction that the diminution shall be "in proportion to the amount of negligence attributable to such employee means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of the negligence attributable to the employee."

Hence the trial court was clearly right in refusing to direct a verdict on the ground of contributory negligence, and properly submitted that question to the jury as one to be considered in diminution of damages only.

[5, 6] We are also of the opinion that the trial court was entirely correct in holding that the questions of negligence and assumption of risk were for the jury. The master is required to exercise such ordinary and reasonable care and precaution for the safety of his servant as the nature and dangers of the business admit of and demand. As between master and servant negligence should be measured by the character and risk of the business engaged in. 26 Cyc. 1077, 1078. While a servant on accepting the employment assumes all the ordinary and usual risks and perils incident thereto, which he knows, or may, in the exercise of reasonable care, know, to exist, he does not assume the extraordinary and unusual risks of the employment. 26 Cyc. 1177-1180. And the servant

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has a right to rely upon representations and assurances of the master, as to the absence of, or precautions against, danger, unless the danger is obvious and imminent. 26 Cyc. 1185. See, also, Southwestern Brewery & Ice Co. v. Schmdt, 226 U. S. 163, 33 Sup. Ct. 68, 57 L. Ed. 170.

Judge Cooley said:

"It is also negligence for which the master may be held responsible if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant having a right to abandon the service because it is dangerous refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." Cooley on Torts (3d Ed.) pp. 1156, 1157.

The principle announced by Judge Cooley is applicable to the case at bar. Hyatt v. H. & St. J. Ry. Co., 19 Mo. App. 287; Schumaker v. St. P. & D. R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257. As was said by the court in Hyatt v. H. & St. J. Ry. Co., supra:

"What difference can there be in an assurance against danger from defects in machinery and against danger from being extraordinarily exposed to the rigor of extraordinary weather? If, as was said, the master cannot prevent the severity of the weather, he can very well provide against it. * * * Notwithstanding the defendant might not have been liable in this case if he had not promised to provide protection from the extraordinary weather, * * * yet when the assurances were given, and the plaintiff was induced thereby to undertake the extraordinary work, it became the duty of the defendant to protect him in the manner assured."

Defendant also predicates error upon the court's instructions to the jury. In its brief defendant says:

"If the court was satisfied as a matter of law that the defendant was guilty of gross negligence, and the plaintiff only guilty of slight negligence in comparison, he should have so instructed the jury, deciding the question himself."

It further says:

"In every personal injury case arising under our statute where a railroad employee is involved, there is a question to be settled either as a matter of law or by the jury, which is a condition precedent to the right of recovery. That question is, Was the negligence of the plaintiff slight and the negligence of the defendant gross in comparison? If the facts are not disputed, or even though disputed, reasonable minds could only draw one conclusion therefrom, and it appears that the negligence of plaintiff was not slight, or, on the other hand, that the negligence of defendant was not gross in comparison with the plaintiff's negligence, there can be no recovery as a matter of law, and the court upon application should direct a verdict."

In our opinion defendant's contentions are erroneous, and in direct conflict with the provisions of the statute. The federal Employers' Liability Act was enacted for the purpose of making certain changes in the then existing law relating to interstate railroads and their employees. Under the laws in force at the time of the enactment of the Employers'

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Liability Act, an employer, though guilty of actionable negligence, would be absolved from liability by establishing the contributory negligence of the employee. The Employers' Liability Act expressly changed this, and provided that contributory negligence on part of the employee should no longer absolve the employer from liability, but should merely be available as a defense upon the question of the amount of damages. Where the causal negligence is partly attributable to the employer, the contributory negligence of the employee will not defeat recovery, but only lessen the damages. "It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." Grand Trunk Western R. Co. v. Lindsay, 201 Fed. 836, 120 C. C. A. 166; Id., 233 U. S. 42, 47, 34 Sup. Ct. 581, 58 L. Ed. 838, 842, Ann. Cas. 1914C, 168; Pennsylvania Co. v. Cole, 214 Fed. 948, 131 C. C. A. 244; L. & N. R. Co. v. Holloway's Adm'r, 163 Ky. 125, 173 S. W. 343. See, also, Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654, 657, 57 L. Ed. 1096, 1101, Ann. Cas. 1914C, 172.

As already pointed out, there can be no recovery under the Employers' Liability Act in the absence of actionable negligence on the part of the railroad company or its employees. A party, in order to maintain an action under the act, must allege and prove (as in other actions based upon negligence): (1) The existence of some duty or obligation on the part of the defendant toward the plaintiff; (2) a failure to discharge that duty; and (3) injury resulting from such failure. And, of course, when the employee's negligence is in fact the sole cause of the injuries, he is not entitled to recover any damages from his employer.

The federal Employers' Liability Act in effect says to the employer: In case one of your employees sustain injuries by reason of your failure to discharge any legal duty which you owe him, you will be required to compensate him therefor to the extent, and to the extent only, that your negligence has caused him detriment. On the other hand it says to the employee: In case you are injured through the negligence of your employer, he will be required to compensate you for the detriment you suffer by reason of his negligence; if you are injured by reason of the combined negligence of yourself and your employer, you must bear that portion of the detriment which your own negligence occasions, and can recover from your employer only such amount as will compensate you for the share of your total loss which your employer has occasioned; but if your injury in fact occasioned solely through your own negligence, then you, and you alone, must bear the loss.

The remaining exceptions to the instructions are so obviously devoid of merit as to merit no consideration.

The judgment and order appealed from must be affirmed. It is so ordered.

Grace, J., concurs in the result.

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SUPREME COURT OF PENNSYLVANIA.

JENSEN

v.

ATLANTIC REFINING CO.*

1. MASTER AND SERVANT—ALLOWANCE OF COMPENSATION —AMOUNT—RULE OF COMPENSATION BOARD.

Under Workmen's Compensation Law, § 309, prescribing weekly wages of employee paid by day, hour, or output as basis of calculating earnings, Workmen's Compensation Board might provide by rule that working days shall mean total number of days in period covered according to calendar, less Sundays, legal holidays, half holidays for each week, and days when employee was prevented from working through no fault of his own, to facilitate determination of weekly wage upon which proportionate compensation was based.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—WORKING DAY.

Workmen's Compensation Law, § 309, did not give any definite meaning to "working day," but left that as between parties in interest under various circumstances to be determined by Workmen's Compensation Board.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AVERAGE DAILY WAGE—COMPUTATION.

Where employee was injured after employment for 38 calendar days, during which there were 6 Sundays, 2 holidays, and 6 half holidays, and was prevented from working 8 days by illness, Workmen's Compensation Board's deduction of 8 days from time he would otherwise have worked in determining average daily wage was proper, under Workmen's Compensation Law 1915, § 309.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

Appeal from Court of Common Pleas, Philadelphia County.

Proceeding by Sorine P. Jensen against the Atlantic Refining Company for compensation under the Workmen's Compensation Law. From a judgment affirming an order of the Workmen's Compensation Board allowing the claim, defendant appeals. Affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Fox, JJ.

Ira Jewell Williams and Yale L. Schekter, both of Philadelphia, for appellant.

Louis Levinson, of Philadelphia, for appellee.

MOSCHZISKER, J. In accordance with section 410, Act June 2, 1915 (P. L. 736, 751), plaintiff, widow of Charles Jensen, entered into a compensation agreement with the Atlantic Refining Company, in whose service her

* Decision rendered, Oct. 7, 1918. 105 A. Rep. 545.

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husband had been accidentally killed, whereby the weekly payments due her, as a dependent, were ascertained in a stipulated maner. Subsequently plaintiff sought to have the agreement in question revised, alleging that "the computation [of compensation] was based upon an incorrect standard of wages of deceased." The board revised the agreement accordingly; and, on appeal, the court below affirmed. Defendant has appealed to this court.

[1, 2] The right of the board to make the revision is not challenged; but the legality of the rule, or method, of computation, which was applied in so doing, is vigorously attacked. Section 309 (P. L. 745) of the Act of June 2, 1915 (P. L. 736), supra, provides, inter alia:

"In [cases of] continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee, his weekly wages shall be taken to be five and one-half times his average earnings at such rate for a working day of ordinary length, excluding earnings from overtime, and using as a basis of calculation his earnings during so much of the preceding six months as he worked for the same employer."

This provision applies to the present case. Deceased began work for defendant December 15, 1916, and continued in the latter's employ until the date of the accident, January 22, 1917, a period of 38 calendar days, in which there were 6 Sundays, 2 holidays, and 6 half holidays aggregating eleven days. In accordance with the relevant provisions of the agreement in this case, the last-mentioned 11 days were deducted from 38, leaving 27, which was used as the divisor in determining the average daily earnings, for the purpose of calculating the weekly wage, in order to ascertain the compensation payable to claimant.

At the hearing for revision, it appeared, and the board found as a fact, that deceased was sick 8 days out of the 38 of his employment with defendant, "and was thus prevented from working those days through fault of his own"; the board ruled that these 8 days also should be deducted, to find the proper divisor for use in determining Jensen's average daily earnings—in other words, that the proper divisor for this purpose was 19, and not 27. The correctness of this decision is challenged on the present appeal.

The total earnings of deceased for the period of his employment were $64.45, which, divided by 27, gives a daily average of $2.39, and, when this is multiplied by 5½, a weekly wage of $13.14, 45 per cent. whereof, the compensation allowed by the act, is $5.92. If, however, 19 is used for the divisor, instead of 27, the daily average becomes $3.39, the weekly wage $18.65, and the compensation $8.39.

The rule applied in this case reads as follows:

"1. Take total earnings for six months preceding the accident, or so much thereof as employee has worked for the same employer. 2. Subtract from said 'total earnings' all earnings for overtime, if any. 3. Divide remainder thus obtained by number of 'working days.' 4. For 'average weekly wage' multiply above result by 5½.

"Note.—'Working days' shall be construed to mean total number of days in the period of employment covered, according to the calendar, less: (a) Sunday; (b) legal holidays; (c) half holiday for each week; (d) days employee was prevented from working through no fault of his own."

This is one of several general rules adopted by the Compensation Board as a guide in classes of cases likely to arise, to facilitate the determination of the weekly wage upon which (under section 306, Act of 1915, supra [P. L. 742]) the allowance of proportionate compensation is based.

Appellant contends that the phrase, "working day," used in the act

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of 1915, supra, must be limited to mean "any day on which work is ordinarily performed, as distinguished from Sundays and holidays"; and, while appellant "freely concedes the power of the Workmen's Compensation Board to formulate rules and regulations governing the administration of the act," it contends the above-quoted rule, in its broader construction of the phrase in question, goes beyond "the legal contemplation of the act, and, therefore, is an unlawful extension thereof or departure therefrom, "under the guise" of an "administrative rule." These contentions cannot be sustained.

The employee might not work every day during the period under investigation, and he might not receive the same daily wage each day he works; recognizing this, the act of 1915, supra, makes it the duty of the referee or Compensation Board, in each case, to find the average daily earning, and, by use of the latter in the manner provided by the statute, arithmetically to determine the average weekly wage received by the injured or deceased person; such finding and computation being for the purpose of assistance in fixing the compensation which the claimant is to receive.

That there are several methods by which the average daily earning may be determined is apparent. First, the actual earnings received during the period must be added together; then, after making such deductions therefrom as are required by the act, the remainder must be divided by the number of "working days" in the period, in order to find the average wage for a working-day of ordinary length; the statute, in effect, so provides. In determining the required divisor, however, the inquiry arises: What is meant by the phrase "working day," as used in the act? Must the divisor be confined to the number of days the person in question actually worked; or shall it include all days that an opportunity was open so to do; or, again, ought it to be arrived at by substracting from such last-mentioned days those on which he failed to work through no fault of his own; or finally, must some other method be pursued, and, if so, what?

After considering all the suggested questions, and others, we are convinced it was not the legislative purpose to give any fixed, definite meaning to the phrase "working day," but believe it was the intention to leave open, for the Compensation Board to determine, what, between the parties in interest, under the circumstances of the various kinds of cases likely to arise, should properly be accounted a "working day." Of course, with that fact determined, there will be no difficulty as to the divisor required in any given case.

[3] Evidently the Compensation Board viewed the act as we have just construed it, and, seeing that, because the meaning of the term "working day" is not defined in the statute, disputes might arise as to how an average daily earning should be computed, that body early adopted rules of computation to fit the various classes of cases which were likely to come before it for determination, including the rule applied at bar, the legality of which is attacked by appellant.

It was the purpose of the Legislature to vest those who administer the Workmen's Compensation Law with broad direction in the ascertainment of facts. McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617. As already suggested, in each case it is necessary to determine the fact of the average daily earning of the injured or deceased person, and, to the extent indicated in this opinion, the act of 1915, supra, leaves the method for so doing to the discretion of the board, or its referee; in the exercise of its best judgment, the former adopted and applied the rule here in question, which, on the facts at bar, seems within its rights under the law.

It is not all apparent the rule is open to the objection, urged by appellant, that in many instances it will lead to inevitable confusion when an attempt is made to determine the days an employee "was prevented

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from working through no fault of his own"; regarding this contention, it is sufficient to say that such inquiry presents no unusual difficulties, but involves simply the determination of issues of fact, after proper examination and investigation of the proofs adduced, as in other cases.

No more is it apparent, in a case like the one before us, that the rule works any injustice; whereas, the rule contended for by appellant, if generally applied, probably would have that effect. For instance, concentrating our thought on the subject of "average daily earnings," suppose A. gives B. "continuous employment," on piece work, both anticipating the job will last indefinitely. During the first week, with Sunday off, B. makes $12, or $2 a day. On Monday of the second week, B. earns $3; the following three days, through no fault of his own, he is too ill to work, but returns on the fifth day and makes $2; on the last day he is killed in the course of his employment, having previously earned $1. Thus, B.'s total earnings are $18. According to the rule contended for by appellant, to arrive at B.'s average daily earnings, we would divide this $18 by 12 (days), which would give a daily wage of $1.50; but under the rule applied by the board, we must divide by 12 less 3, or 9 (days), which gives an average daily wage of $2. It is plain that $2 more nearly represents B.'s real average daily earnings than $1.50; and, of the two sums, the former certainly more nearly approximate B.'s earning power. It likewise is plain that, figuring on 6 days, $12 comes nearer what would be B.'s average weekly earnings than $9.

Exeptional instances have been suggested by counsel where the rule here successfully applied might not work out exact justice in determining a weekly wage, for example, where an employee ,through illness or other proper cause, remains away from his job a certain number of days out of each and every week, and continues this course for such a considerable period that it becomes apparent the remaining days of the week really represent his physical capacity for work, and, accordingly, affect his average earnings; but the present case does not fall within this example. Such a case will, no doubt, receive due consideration when, and if, it comes before the Compensation Board.

The rule under consideration is couched in general language, but, like all regulations of procedure not firmly fixed by statutory enactment, the tribunal which announced it may depart therefrom, should a case arise which falls within the broad language employed, yet where its unqualified application would work plain injustice. The controlling question presented on this appeal, however, is not the one principally argued by counsel—i. e., as to the general propriety, or applicability, of the rule we have been discussing, but whether or not such rule was legally applicable to the circumstances of the present case. We conclude that, on the facts at bar, the application of the rule in question shows no breach of either the letter or purpose of the act; neither does it work manifest injustice, nor offend against any revelant general principle of law. Therefore the learned court below did not err in approving the award of compensation.

The judgment is affirmed.

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SUPREME COURT OF PENNSYLVANIA.

RAKIE

v.

JEFFERSON & CLEARFIELD COAL & IRON CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AVERAGE DAILY EARNINGS—COMPUTATION OF WORKING DAYS.

In computing number of working days to determine workmen's average daily earnings during six months preceding accident under a rule of Workmen's Compensation Board providing that "days employee was prevented from working through no fault of his own" should be deducted, the days during which work was suspended on account of a labor dispute, together with Sundays and holidays during such six months, should be deducted.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

2. MASTER AND SERVANT—INSTANTANEOUS DEATH—COMPENSATION PERIOD.

In case of the instaneous death of an employee by accident, the period of compensation under Workmen's Compensation Act June 2, 1915, art. 3, § 306, cls. "d," "f," section 307, and article 4, §§ 410, 422, does not begin until 14 days after his death.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

Appeal from Court of Common Pleas, Indiana County.

Proceedings under the Workmen's Compensation Act by Mrs. Felix Rakie for compensation opposed by the Jefferson & Clearfield Coal & Iron Company, employer. From an order reducing an award of compensation made by the Workmen's Compensation Board, plaintiff appeals. Modified and affirmed.

Argued before Stewart, Moschzisker, Frazer, Simpson, and Fox, JJ.

S. J. Telford, of Indiana, Pa., for appellant.
Henry I. Wilson, of Big Run, for appellee.

MOSCHZISKER, J. On September 29, 1916, while at work as an employee in defendant's mine, Charles Rakie was accidentally killed. In the 6 months preceding his death there were 184 calendar days, during 88 of which the mine was closed, and deceased did not work. The record contains a finding of the referee, adopted by the Compensation Board, that "the deceased's idleness during this period was not due to any fault of his own." To arrive at a divisor, for the purpose of determining the average daily earnings of deceased, in order to calculate his weekly wage, so as to ascertain the compensation payable to claimant the before-mentioned 88 days, together with Sundays and holidays occurring during the 6 months in question, were deducted in accord with the relevant standing rule of the board.

[1] The first question raised involves the propriety of the rule above referred to. We have recently sustained its validity (see Jensen v. Atlantic Refining Co., 105 Atl. 545, not yet officially reported), and, on

* Decision rendered, Oct. 23, 1918. 105 Atl. Rep. 638.

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the findings of the referee, there can be no question of the rule's applicability to the present case. The learned court below erred in deciding otherwise.

[2] The next "question involved" is correctly stated by appellant thus:

"In case of the instantaneous death of an employee by accident, does the period of compensation begin with the day of his death or is it deferred to begin 14 days thereafter"?

There is room for argument as to the proper construction to be placed upon the act of June 2, 1915 (P. L. 736), in this regard; but, taking into consideration all the pertinent provisions of the statute, particularly sections 306 (clauses "d" and "f"), 307, and 311 of article 3 and sections 410 and 422 of article 4, we are not convinced the court below erred in determining that the 14 days must elapse and compensation in this case be counted from October 14, 1916.

It follows, the final order of the common pleas must be modified as to the amounts awarded, but not as to the dates from which the respective awards run. Therefore it is now decreed that, in accord with the provisions of article 3, § 307, of the act of June 2, 1915 (P. L. 736), Mrs. Rakie, widow, is to receive compensation at the rate of 55 per cent. of $20, or $11 per week, payable semimonthly, for a period of 300 weeks, beginning October 14, 1916, provided she so long lives and remains unmarried, and at the end of said period of 300 weeks, compensation is awarded to the three minor children of deceased, i. e., Charles, Annie, and Mary, at the rate of 35 per cent. of $20, or $7, per week, payable semimonthly, until March 18, 1926; and from March 18, 1926, to Annie and Mary Rakie at the rate of 25 per cent. of $20, or $5, per week, until November 18, 1928; and from November 16, 1928, to Mary Rakie at the rate of 15 per cent. of $20, or $3, per week, until January 16, 1913.

SUPREME COURT OF RHODE ISLAND.

TAGLINETTE

v.

SYDNEY WORSTED CO. (No. 5238.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MINORS—"WORKING AT AGE LEGALLY PERMITTED."

Unless employer has age and employment certificate provided for by Pub. Laws 1916, c. 1378, § 1, minor between ages of 14 and 16 is not working "at an age legally permitted under laws of this state," within meaning of Workmen's Compensation Act, art. 1, § 6.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The Workmen's Compensation Act provides compensation and new remedies for those injured in industrial employments which involve loss, delay, and expense, and render more certain the recovery of compensation

* Decision rendered, March 7, 1919. 105 Atl. Rep. 641.

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when most needed, and is to be interpreted with a liberality calculated to effectuate such purpose.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REPEAL OF STATUTE.

Pub. Laws 1916, c. 1378, was enacted after the passage of the Workmen's Compensation Act, and is therefore, in so far as their provisions conflict, if such be the case, controlling.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYMENT OF CHILDREN—CERTIFICATE FROM SCHOOL COMMITTEE.

Under Pub. Laws 1916, c. 1378, an employer, who has received from proper school committee and has in his possession a certificate in form substantially as required by law, particularly in all its essential features, is not required to investigate accuracy of statements in certificate, but is entitled to rely upon it as rendering employment of child named as being legally permitted, and that said child is sui juris as an employee under Workmen's Compensation Act, art. 1, § 6.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

6. MASTER AND SERVANT—EMPLOYMENT OF INFANTS.

Employment of minor between 14 and 16 years of age will not be held to be illegal on account of fact that child's mother signed age and employment certificate issued by school committed under Pub. Laws 1916, c. 1378, and falsely stated that she had control of child, when the child was in fact under control of his father.

(For other cases, see Master Servant, Dec. Dig. § 95.)

7. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING.

In common-law action for injuries to servant between ages of 14 and 16 years, right to sue being based on ground that employer did not have in his possession an age and employment certificate, as required by Pub. Laws 1916, c. 1378, it is necessary to allege that employer did not have such certificate at time of accident.

(For other cases, see Master and Servant, Dec. Dig. § 258[8].)

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by John Taglinette against the Sydney Worsted Company. The superior court rendered a decision sustaining a demurrer to plaintiff's reply, and plaintiff excepts. Exception overruled, and case remitted for further proceedings.

Archambault & Jalbert, of Woonsocket, for plaintiff.

Green, Hinckley & Allen, of Providence (Abbott Phillips and Chauncey E. Wheeler, both of Providence, of counsel), for defendant.

BAKER, J. This is an action at common law to recover damages for the death of Vito Taglinette, a minor, resulting from injuries received while employed by the defendant at its factory in Woonsocket. The plaintiff is the father of the deceased.

The declaration is in the usual form for common-law actions based on negligence. To the declaration the defendant filed a plea in abatement, which alleges, in substance, that at the time of the accident both the

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defendant as employer and the deceased as its employee were subject to the provisions of the Workmen's Compensation Act (Laws 1912, c. 831), and therefore a common-law action could not be maintained.

The plaintiff in his replication sought to take the case out of the provisions of the Workmen's Compensation Act by alleging that under section 6, art. 1, thereof, a minor, in order to become subject to its provisions, must be of an age at which he can legally be permitted to work under the laws of Rhode Island; that at the time of the injury the deceased was over 14 years of age, but not 16, and was employed in a manufacturing establishment; that the defendant at the time the deceased entered its employ did not have in its possession an age and employment certificate prescribed by section 1 of chapter 78 of the General Laws of 1909, as amended by section 1, chapter 1378, Laws 1916, because the age and employment certificate in the possession of the defendant stated that the mother had control of the deceased, and was signed by her, whereas it should have been signed by the plaintiff, and should have stated that the father had control of the deceased. A copy of the certificate in question is set forth in the replication.

The defendant demurred to the replication upon the following grounds:

"(1) It appears in the declaration and in the replication that said Vito Taglinette, at the time of the said alleged accident mentioned in the declaration, was working at an age legally permitted under the laws of this state.

"(2) It appears in the replication that, at the time said Vito Taglinette entered the employment of said defendant, the latter had in its possession an age and employment certificate of said Vito Taglinette, given by or under the direction of the school committee of the city of Woonsocket, where said Vito resided, which said certificate conformed to the provisions of said section 1 of chapter 1378 of the Public Laws of Rhode Island of 1916.

"(3) It appears in the replication that at the time when said Vito Taglinette entered the employment of said defendant the latter had in its possession an age and employment certificate of said Vito Taglinette as required by law.

"(4) It does not appear in and by the declaration or replication that at the time of the said alleged accident to said Vito Taglinette mentioned in the declaration the defendant did not have in its possession the age and employment certificate of said Vito Taglinette required by law.

"(5) It is immaterial, in so far as the defendant is concerned, that said age and employment certificate referred to in said replication stated falsely that the person having control of said Vito Taglinette was his mother, rather than his father, inasmuch as it appears that said certificate was in proper form and given by or under the direction of the school committee of said city of Woonsocket.

"(6) It is immaterial, in so far as the defendant is concerned, that said age and employment certificate referred to in said replication was signed by the mother of said Vito Teglinette instead of by his father, inasmuch as said certificate was in proper form and given by or under the direction of the school committee of said city of Woonsocket."

The superior court rendered a decision sustaining said demurrer, to which decision the plaintiff excepted. The case is now here on said exception.

The question in controversy really is whether or not the plaintiff's deceased minor child was, at the time of his death, an employee of the defendant subject to the provisions of chapter 831 of the Public Laws, designated as the Workmen's Compensation Act. If he was such an employee, then the present action is not maintainable, as "the right to compensation for an injury, and the remedy therefor granted by" said

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act, are "in lieu of all rights and remedies as to such injury * * * either at common law or otherwise" which existed at the time of the passage and approval of said chapter 831. The question arises primarily from the fact that said deceased was a minor. One of the provisions of section 6 of atrcile 1 of said chapter is as follows:

"A minor working at an age legally permitted under the laws of this state shall be deemed sui juris for the purpose of this act."

The act, however, is itself silent as to when a minor is legally permitted to work. The conditions determinative of this fact are set forth in section 1 of chapter 1378 of the Public Laws, which is in amendment of and in addition to section 1 of chapter 78 of the General Laws, entitled "Of Factory Inspection."

Clause 1 of section 1 of chapter 1378 declares that:

"No child under fourteen years of age shall be employed or permitted or suffered to work in any factory, or manufacturing or business establishment within this state."

And clause 2 of the same section declares that:

"No child under sixteen years of age shall be employed or permitted or suffered to work in any factory or manufacturing or business establishment unless said person, firm, or corporation employing him or her shall have in his, their or its possession an age and employment certificate, given by or under the direction of the school committee of the city or town in which said child resides."

One of the statements which said certificate must contain is "that said child has completed fourteen years of age. From this it is plain that no child under 14 is legally permitted to work in the business establishments enumerated, that a child under 16 years of age who has completed 14 years may work in such business establishments, but only when his employer has in his possession the age and employment certificate referred to. In the present case the facts admitted by the pleadings show the deceased was a few months more than 14 years of age when he was employed by the defendant company to work in its factory.

[1-4] The first ground of demurrer is that the admitted facts show that the deceased minor at the time of his death "was working at an age legally permitted under the laws of this state," and the defendant urges that as a necessary consequence the deceased was sui juries for the purposes of the Workmen's Compensation Act. To state it otherwise, in effect the claim is that, inasmuch as the deceased was 14 years of age, and inasmuch as a child of that age may legally be permitted to work in a factory, the deceased, simply because of his age, was legally an "employee' under the Workmen's Compensation Act, as that term is defined in section 1 (b) of article 5 of the act.

Most, if not all, of the states which have a provision in their compensation acts relative to the employment of minors employ this language, "minors who are legally permitted to work under the laws of the state." It has been held that this language "was intended to exclude from the statute [Workmen's Compensation Act] minors whose employment is prohibited by law." Pette v. Noyes, 133 Minn. 109, 112, 157 N. W. 998, 996; Westerlund v. Kettle River Co., 137 Minn. 24, 162 N. W. 680, 15 N. C. C. 720, 724. The language of our act, "A minor working at an age legally permitted under the laws of this state shall be deemed sui juris" is apparently employed in no similar act except in Ohio, where the Supplemental Act (effective January 1, 1914), in amendment of the Workmen's Compensation Act, employs the indentical language of our act. See Honnold on Workmen's Compensation, vol. 2, 1487, § 46. In Acklin Stamping Co. v. Kutz (Ohio, 1918), 120 N. E. 231, it is held that, if illegally employed, a minor "would not be an employee within the meaning of that term" in the Compensation Act. Inasmuch as the Compensation Act is silent as to the age when a minor is permitted to work, it

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is obviously necessary that this provision must be construed in connection with section 1 of chapter 1378. Doing this, we are of the opinion that the first ground of defendant's demurrer is not well founded. As already appears, clause 2 of section 1 of chapter 1378 provides that "no child under sixteen years of age shall be employed or permitted or suffered to work in any factory," unless the employee has in his possession an age and employment certificate. Hence the employment of a child of 14 without such certificate is expressly prohibited, and therefore unlawful. If the statute without qualification named 14 years as the age at which minors are legally permitted to work, then the construction claimed would unquestionably be correct. But since the statute prohibits employment below the age of 16, unless the employer has a certificate in his possession then, in our opinion, it must be held that a minor, working in a factory at the age of 14, when there is no certificate in his employer's possession, is not working at an age legally permitted under the laws of this state. To state it otherwise, the word "age" in the citation from section 6 of article 1 of the Workmen's Compensation Act is to be construed in the light of the condition expressed in section 1 of chapter 1378, affecting and determining the legality of the employment of a minor 14 years old. The Factory Inspection Act (Gen. Laws 1909, c. 78), in so far as it affects child labor, and the Workmen's Compensation Act are both examples of modern social legislation along different lines. The one seeks to give the child a larger opportunity for future usefulness by requiring him to get some measure of education before engaging in certain kinds of work, and by protecting him in his years of immature mental and physical development from hazardous and hurtful employments. The other provides compensation and new remedies for those injured in industrial employments which involved less delay and expenses and render more certain the certainty of recovery of compensation, when most needed, than existed under the older form of remedy. Each has a beneficent design, and each is to be interpreted with a liberality calculated to effectuate its purpose. The argument, however, in favor of extending the Compensation Act by recognizing as legal the inclusion among employees those minors whose employment the Factory Act forbids does not commend itself. It may be noted that chapter 1378 of the Public Laws was enacted four years after the passage of chapter 831, and is therefore, in so far as their provisions conflict, if such be the case, controlling.

[5, 6] The second and third grounds of demurrer state in different ways that the employment in its factory of the deceased by the defendant was legal because it had in its possession an age and employment certificate, given by or under the direction of the proper school committee. It is admitted by the plaintiff that the defendant had a certificate thus given, but he claims that it was not the certificate required by section 1 of chapter 1378; that it was therefore null and void, and that in consequence the deceased was not legally employed.

Without now discussing the effect of inaccuracies of statements of fact in such a certificate, it is proper first to consider the significance and effect of an employer's having in its possession an age and employment certificate given by or under the direction of the proper school committee. This renders necessary a more careful consideration of section 1 of chapter 1378.

We have already seen that clause 2 of said section prohibits the employment of a child under 16 years, unless the employer has in "its possession an age and employment certificate, given by or under the direction of the city or town where the child resides." It appears by the same clause that "the official authorized to issue the age and employment certificate" determines from the evidence submitted to him whether "the child applying for such certificate is fourteen years of age," and whether the child has the educational qualifications required by the statute, and, if his findings on these points are favorable, he then sends

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such child to a licensed physician for a physicial examination, who is required, if the result of his eexamination justifies it, to "certify in writing that such child is in sufficiently sound health and physically able to be employed in any of the occupations or processes in which a child between fourteen and sixteen years of age may be legally employed." This physician's certificate is apparently to be sent to the official authorized to issue the age and employment certificate, inasmuch as such official in his certificate is required to state that the examining physician has certified to the physical fitness of the child, and inasmuch as clause 10 of said section 1 requires said official to "keep on file a copy of each certificate granted, together with the evidence on which such certificate was granted."

Clause 3 provides that the age and employment certificate may be applied for and completed at any time, and that it "shall be kept on file and not delivered by the official authorized to issue the same until he shall have received a written statement signed by the employer * * * with the name and address of the employer agreeing to employ the child in accordance with * * * all provisions of law governing such employment." This clause also provides that "all such certificates shall be delivered to the employer when issued and in force and in no case to the child."

Clause 4 provides that such certificates shall be uniform throughout the state and in the form set out in said clause, "or such substantially similar form as may be approved by the secretary of the state board of education."

Clause 5 provides for the return to the school official of such certificate by the employer within five days after the termination of employment of said child, to be kept on file by such official until issued again as before.

By clause 7 such certificate is required to be kept by the *employer* "at the place where such child is employed," and is to be shown to any factory inspector on demand.

Clause 8 is as follows:

"Whenever any factory inspector shall have reason to doubt the accuray of any statement made in any such certificate concerning the age or other qualifications of any child employed thereunder, such inspector shall demand such certificate of the employer of such child, and upon receiving the same shall give such employer a receipt therefor. If after investigation such inspector shall find that such certificate should not have been issued to said child under the provisions of this law, then he shall deliver such certificate to the person who issued it, and shall order it to be canceled; and shall forthwith notify the said employer that such child must not be longer employed. Every employer or proprietor or manager of any factory or manufacturing or business establishment who shall continue to employ such child after receiving such notice from any factory inspector shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to the penalty imposed by section 12 of this chapter."

Section 12 of chapter 78 makes it a misdemeanor for any person to employ a child who is under 16 years of age without the certificate required by section 1.

From the provisions of section 1 of chapter 1378 above quoted and referred to it is very clear, we think, that the entire responsibility of obtaining the information required to be set out in an age and employment certificate, and of issuing a proper certificate, is placed in the first instance on the school committee of the child's place of residence; that in certain respects the statements contained in the certificate may, after it is issued, be examined by any factory inspector as to their accuracy, and that if he find the certificate should not have been issued, he may order its cancellation. We regargd it as equally plain that in these circumstances an employer, who has received from the proper school

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committee and has in his possession a certificate in form substantially as required by law and particularly in all its essential features, is not required to investigate the accuracy of the statements of the certificate, but is entitled to rely upon it as rendering the employment by him of the child therein named as being legally permitted, and that said child is sui juris as an employee under the Workmen's Compensation Act. The provision in clause 8 relative to the continued employment of the minor after cancellation of the certificate strongly implies that prior to such cancellation the employment is legal.

It is conceivable that something denominated an age and employment certificate might be given to an employer, so plainly deficient on its face in the essential particulars prescribed by statute that it would not legalize the employment of the child, or protect the employer from criminal prosecution. On the other hand, it probably would not be contended that every possible inaccuracy of statement would render the certificate of no legal effect. The only specified defect, as already stated, is that in the certificate given by the official designated by the school committee of Woonsocket to issue such certificate the mother of the child signs the certificate, and states that she has control of the child, which it is alleged is a false statement, inasmuch as the plaintiff, the child's father, at the time lived with and had control of him.

The defendant by its demurrer, while admitting this allegation of fact to be false, namely, that the mother had control of the child, says, in effect, in its fifth and sixth grounds of demurrer, that the inaccuracy or defect is immaterial so far as the defendant is concerned. An inspection of clause 2 of section 1 of chapter 1378 makes it very evident that, in addition to the child's name and residence, there are only three matters treated as of prime importance in the certificate, namely: (1) That the child has completed 14 years of age; (2) that he is able to read at sight and write legibly simple sentences in the English language; and (3) that he shall be certified by a physician to be in sufficiently sound health and physically able to be employed in any of the occupations or processes in which a child between 14 and 16 years of age may be legally employed.

The statue also provides for the inclusion in the certificate of a description of certain specified physical characteristics of the child, such as height, color of eyes and hair, and complexion, states who shall furnish some of the information called for, and specifies with particularity what kind of evidence must be furnished to prove the age of the child.

It is noteworthy, however, that as by clause 8 authority is only conferred on a factory inspector to investigate as to whether a certificate has been properly issued, and, if his finding is adverse, to order cancellation, when he "shall have reason to doubt the accuracy of any statement made in any such certificate concerning the age or other qualifications of any child employed thereunder," enfirmatory evidence is furnished thereby of the essential importance of the statements as to age, as to the possession of ability to pass the specified educational test, and as to physical fitness of the child for work in which he may be legally employed, these in fact being the only "qualifications" of the child required to enable him to be legally employed. It is fairly implied, we think, that, while the other statements in the certificate may be useful for example, in establishing the identity of the child working under the certificate with the child named therein, they are not of such material importance that every inaccuracy in such statements would render the certificate null and void.

The form of the certificate given in clause 4 commences as follows:

"This certifies that I am the (father, mother, guardian, or custodian) and have control of (name of child), whose signature appears below, and that (he or she) was born at (name of town or city), in the county of and state (or country) of , on the (day)

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of (month), A. D. , and is now (number of years and months) old."

This is to be signed by the child and by the "person having control of said child."

As already stated, the plaintiff relies wholly on the fact that the child's mother represented herself as being in control of the child and signed the certificate.

It is doubtless a natural arrangement to have the information contained in the foregoing certificate given by a person holding the relation to the child of parent, guardian, or custodian. Ordinarily such persons might be presumed to possess such information. But inasmuch as in general a father is entitled to the custody and control of his minor child, and as the guardian of the person of such child is by law entitled to such control, and as also this is true of a mother, if she be a widow, and ordinarily so with her in fact in the absence, whether temporary or prolonged, of the father, it is not easily apparent why the form should have the words asserting control of the child, especially as the certificate is apparently simply for the purpose of giving the name, place, date of birth, and age of the child, and especially also as the statements in the certificate in regard to name, date and place of birth of said child cannot be accepted as true by the official of the school committee until "substantiated by a duly attested copy of the birth certificate, baptismal certificate, or passport of such child" (clause 2), or if it appears that such evidence cannot be produced, until substantiated by "other evidence satisfactory to the secretary of the state board of education" (clause 6). Under chapter 139 of the General Laws entitled "Wrongs to Children," a child may be taken into custody by designated officers of the law and delivered to certain named institutions for the care of children or "to some suitable person, who may be willing to receive" the child "into his family," to be there properly brought up. Such person may aptly be described as having the control, and as being custodian, of the child. Perhaps cases involving children thus situated may have led to the use of the word "and have control, in the certificate. It also may be noted that the prescribed form of the certificate nowhere requires the assent of the parent guardian, or custodian to the employment of the child, although, if deemed of importance, such consent could be inferred from the signing. However, whatever may have been the purpose in the use of the words "and have control" in the form of certificate prescribed, we are of the opinion that the fact of their falsity in strict legal sense, when applied to the mother, while the father lives with their child, does not itself invalidate an age and employment certificate. In view of the slight credence which the statute permits to be given to the statement by the parent, guardian, or custodian as to the name, place, and date of birth of the child, and in view also of the purpose of chapters 78 and 1378 in permitting the employment of minors of the age of 14 and 15 years when they possess certain specified educational and physical qualifications, when these qualifications are shown to exist, we are of the opinion that it would not be reasonable to hold the employment of a minor to be illegal on account of the incorrectness of a statement so clearly unimportant as the one on which the plaintiff rests his case.

The plaintiff cites certain cases as supportive of his claims, but we think they are for the most part of little assistance in deciding the question before us.

In Lostutter v. Brown Shoe Co., 203 Ill. App. 517, a minor over 14 years of age and under 16 was injured while engaged in work prohibited by the Child Labor Act (Hurd's Rev. St. 1917, c. 48, §§ 20-200), and it was held that he was not under the provisions of the Workmen's Compensation Act (Laws 1913, p. 335). There was no question as to the sufficiency of an employment certificate considered. One question argued was whether an amendment to the Compensation Act by implication repealed or abrogated a provision of the Child Labor Act.

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In Westerlund v. Kettle River Co., supra, it was held that the minor was working in a prohibited employment, and that he was not within the provisions of the Compensation Act. Kutz v. Acklin Stamping Co., 27 Ohio App. 275 (1917) is Acklin Stamping Co. v. Kutz, supra. In that case a minor less than 16 years old was working without a certificate and at a prohibited hour of employment. American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766 (1905), does not involve a construction of the Workmen's Compensation Act of that state, which did not go into effect until 1912. A minor was working in violation of the Child Labor Law, and was injured. Questions as to the liability of the employer were considered, one of them being the effect of a misrepresentation of the minor as to his age. In Roszek v. Bauerle & Stark Co., 282 Ill. 557, 118 N. E. 991 (1918), a minor between the ages of 14 and 16 years was working without a permit, although one was required for minors of such an age. Held that the employment was unlawful, and that the minor was not an employee within the provisions of the Workmen's Compensation Act. In Stetz v. F. Mayer Boot & Shoe Co., 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675 (1916), a minor less than 16 years of age at the time of his employment and injury had not obtained from the commissioner of labor "a written permit authorizing the employment of such child." The plaintiff when employed represented that he was 16 years of age. Held that the employment was illegal. The question of whether the misrepresentation as to his age would bar plaintiff's action at law was considered and decided in the negative. In Chabot v. Pittsburgh Plate Glass Co., 259 Pa. 504, 103 Atl. 283 (1918), a boy 14 years old was injured. Public Law 283, passed in 1909, forbade his employment, unless his employer procured and kept on file an employment certificate issued to the minor, and kept "two lists of all minors under the age of sixteen years employed in or for his or her establishment"; one of said lists to be kept on file in the office, and one to be conspicuously posted in each of the departments in which minors were employed. The employment certificate was procured, but the lists of minors were not kept or posted. It was held that the requirement to post the lists was mandatory, and that such breach of the law was sufficient to convict the defendant of negligence as a matter of law. The Workmen's Compensation Act passed in 1915 (Laws 1915, c. 1268) is not referred to, and there is no suggestion that either party to the action at law claimed to be under the Compensation Act.

The defendant calls attention to Foth v. Macomber & Whyte Rope Co., 161 Wis. 549, 154 N. W. 369. In this case a minor, while properly employed by the defendant, was at one time put to the performance of some work prohibited by law. Being injured, he brought an action at law. It was held that it could not be maintained, as he was an employee within the provisions of the Workmen's Compensation Act. In Lutz v. Wilmanns Bros. Co., 166 Wis. 210, 164 N. W. 1002 (1917), on a similar state of facts the court followed its ruling in the case of Foth v. Macomber & Whyte Rope Co., supra, distinguishing the latter case from Stetz v. Mayer Boot & Shoe Co., supra.

[7] The fourth ground of demurrer is that the plaintiff nowhere alleges that at the time of the accident "the defendant did not have in its possession the age and employment certificate * * * required by law." We think this ground is well taken, as inspection shows this defect in the statement of plaintiff's case. This, however, is plainly an amendable defect, while the other grounds are decisive of the plaintiff's right to recover in this action.

In accordance with what has already been said, we are of the opinion that the decision of the superior court was right in sustaining the defendant's demurrer to the plaintiff's replication on all the grounds stated therein, except ground 1, which we do not think is well taken.

The exception of the plaintiff is therefore overruled, and the case is remitted to the superior court for further proceedings.

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SUPREME COURT OF WISCONSIN.

WALDUM

v.

LAKE SUPERIOR TERMINAL & TRANSFER RY. CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —"OPERATING STEAM RAILROAD AS COMMON CARRIER."

Defendant railway incorporated under St. 1915, § 1820, and engaged chiefly in switching cars of other companies, *held,* in view of section 3214, to have been at the time plaintiff was injured while engaged in switching box cars "operating a steam railroad as a common carrier," within Workmen's Compensation Act (St. 1915, § 2394—8, subd. 3), denying compensation in such case unless both employer and employee shall have accepted the provisions of the act in writing.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION— MEANING OF WORDS—PRESUMPTION.

The Supreme Court must assume that the words of Laws 1913, c. 599, amending and reenacting the Workmen's Compensation Act (Laws 1911, c. 50), were chosen with reference to their established legal meaning.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION —ACCEPTANCE OF ACT—RAILROADS.

The Supreme Court must assume that Legislature adopted with full understanding of its legal effect, the language of St. 1915, § 2394—8, subd. 3, providing that sections 2394—3 to 2394—31, inclusive, shall not apply to employees switching freight cars for a railroad company "operating a steam railroad as a common carrier,' unless both employer and employee have accepted provisions of act.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

When Workmen's Compensation Act, which applied to employees of all railroad companies, was amended by Laws 1913, c. 599, so as to exclude employees of all railroad companies operating steam railroads as common carriers, the intent was to exclude companies organized as railroad companies and doing business as common carriers.

(For other cases, see Master and Srvant, Dec. Dig. § 361.)

13. MASTER AND SERVANT—WORKMEN'S COMPENSATION —DECISION ON QUESTION OF LAW.

Whether defendant railway was a common or private carrier under Workmen's Compensation Act (St. 1915, § 2394—8, subd. 3) is a question of law and appellate court is not bound by decision of Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

14. MASTER AND SERVANT—WORKMEN'S COMPENSATION PROCEEDING—JURISDICTION—WAIVER.

Plaintiff, by appearing before the Industrial Commission, would not waive his right to object to jurisdiction, where the commission had no

* Decision rendered, Feb. 4, 1919. 170 N. W. Rep. 729.

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jurisdiction over the subject-matter, since the parties in such case could not confer jurisdiction even by stipulation.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

15. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION TO COME UNDER WORKMEN'S COMPENSATION ACT.

That plaintiff may have been under the Workmen's Compensation Act by reason of his employer's election under Laws 1911, c. 50, is insufficient to place him under the act as amended (Laws 1913, c. 599); his employment having been intermittent, and there having been no election by him, under St. 1915, § 2394—8, subd. 3, requiring election by both employee and employer.

(For other cases, see Master and Servant, Dec. Dig. § 357.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Action by Soren Waldum against the Lake Superior Terminal & Transfer Railway Company and the Industrial Commission of Wisconsin to set aside the award under the Workmen's Compensation Act. From judgment entered on an order confirming the award, plaintiff appeals. Reversed and remanded, with directions.

Plaintiff was injured August 30, 1916, at Superior, while working for the Lake Superior Terminal & Transfer Railway Company, hereinafter referred to as the railway company. At the time of the accident he was engaged in switching a string of empty box cars from the yards of the Northern Pacific Railway Company to the C. Reiss Coal Company's dock in the city of Superior. He was on top of a box car which was struck by other cars, and he was thrown under the cars and suffered injuries which resulted in the loss of his left arm. He had been employed by the railway company off and on since 1908. The railway company made application to the Industrial Commission for adjustment of compensation under the terms of the Workmen's Compensation Act. Plaintiff claimed that the Industrial Commission had no jurisdiction because the employees of the railway company were not subject to the Workmen's Compensation Act. The Industrial Commission after a careful examination held that it had jurisdiction and made an award. Plaintiff brought an action in the circuit court for Dane county to set aside the award, and upon hearing the circuit court made an order confirming the award, and judgment was entered thereon, and from such judgment plaintiff brings this appeal. Other material facts are stated in the opinion.

W. P. Crawford, of Superior, for appellant.

Spencer Haven, Atty. Gen., and Winfield S. Gilman, Asst. Atty. Gen., for respondent Industrial Commission.

J. A. Murphy, of Superior, for respondent Lake Superior Terminal & Transfer Co.

ROSENBERRY, J. (after stating the facts as above). Section 2394—8, subd. (3), Stats. 1915, is as follows: "The provisions of sections 2394—3 to 2394—31, inclusive, shall not apply to employees operating, running or riding upon, or switching freight or other trains, engines or cars for a railroad company operating a steam railroad as a common carrier," unless both employer and employee shall have accepted the provisions of the act in writing. The railway company admits that it is organized as a railroad company, and is authorized by its charter to do business as a common carrier, but contends that it does not operate a steam railroad as a common carrier.

[1] The main question in this case is, Was the railway company at the time in question operating a steam railroad as a common carrier?

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The railway company is incorporated under section 1820, c. 87, Wis. Stats., which authorizes the formation of a corporation for the "purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons or property," etc., and provides that upon the issuance of the patent provided for the corporation so formed "shall possess all the powers and privileges and be subject to all the provisions of the law regulating railroad corporations."

Section 3214, Stats. 1915, provides:

"Every association or company formed for the transportation of passengers or property, either by boats, vessels, stages, or other means, shall make a statement of the names of the persons comprising such association or company and file a copy of the same in the office of the clerk of the circuit court of each county through or into which it may transact business. All persons, companies and corporations engaged in any such business shall be deemed common carriers."

[2] The following facts are substantially undisputed: The railway company was incorporated by four railroads entering the city of Superior: the Great Northern Railway Company, the Northern Pacific Railway Company, the Duluth, South Shore & Atlantic Railway Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company; and by their joint action they fix and determine its policies. The tracks of the railway company run from the termini of the railroad companies which it serves to the various industries, docks, and elevators of Superior, about 100 in number. The railway company has filed its annual reports as a railroad company with the Railroad Commission of Wisconsin from 1914 to 1917, inclusive. On November 16, 1911, it filed its tariffs with the railroad commission, effective October 15, 1911, by which tariffs it is bound to transport loaded cars from one carrier to another, or from a carrier to an industry on its own tracks, or from connecting roads to industries on the Tower Bay front, at from $1 to $3 per car; to transport loaded cars from one industry to another at three-quarters of a cent per hundredweight of contents; to handle less than carload lots from a connecting carrier to an industry and from one industry to another at 5 cents per hundredweight. The fact that it settles with the owning companies on a basis of cost is immaterial. While the reports and tariffs were not proved, we take judicial notice of them. C. & N. W. Ry. Co. v. Railroad Comm., 156 Wis. 47, at 62, 145 N. W. 216, 974. The railway company owns no passenger or freight cars, but has 11 steam locomotives and employs from 30 to 70 men. As the business is actually conducted, the principal part of it is taking cars from the owning companies, switching them to plants, docks, and elevators, and returning them to the owning companies. At the time of its organization 99 per cent. of its total business was transacted for the owning companies. In recent years about 90 per cent. of its business has been transacted for the same companies, the 10 per cent. remaining being made up of work the railway company does for other connecting railroads and a small amount of business done for the public. The articles of incorporation contain the following provision:

"The general nature of the business of this company shall be to acquire depot, storing, yard and shop grounds, construct, maintain, use and operate for public use railroad lines and tracks, building, depots, depot grounds and storage tracks and shops and other railroad conveniences and appliances, in the county of Douglas, in the state of Wisconsin, for the transportation of rolling stock, freight and passengers, and for the purpose of connecting any and all the other various lines of railroad running to or into the said county of Douglas, and for the purpose of transferring rolling stock, freight and passengers between such railroads and between such railroads and docks and piers and vessels touching at any port or place in the county, and generally to exercise powers conferred by the statutes of the state of Wisconsin relative to the organization and powers of railroad corporations."

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The railway company has not handled for the general public any freight other than what is contained in the cars of some other railroad. The business transacted for local industries is not accepted directly by the railway company, but is contracted for through some of the owning companies. Waybilling and arrangements for shipment over its tracks are taken care of by the companies whom it serves. It has no ticket office and handles no freight except such as it receives from or through other railroad companies.

[3] A common carrier is defined as one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place. This definition is approved in Doty v. Strong, 1 Pin. 313, at 324, 40 Am. Dec. 773. See 10 C. J. 339, note 35.

[4] What did the Legislature mean by exempting the employees of "a railroad company operating a steam railroad as a common carrier"? Obviously it left subject to the act the employees of all railroad companies operating by electricity or other motive power than steam. By limiting the exemption to the employees of a railroad company which operates a steam railroad as a common carrier, it made subject to the act the employees of the numerous railway companies operating as private carriers within the state, such as logging railroads and other like railroads operated for private purposes. We are not disposed to rest this decision upon narrow technical grounds, but rather upon broad general principles, and to ascertain and if possible give effect to the intent of the Legislature, which is, after all, the primary purpose in the construction of this or any other statute.

What the railway company in fact does is to accept for transportation for hire the property of all persons who have any need of the services which it is equipped to render. Under its contract and tariffs it must trnsport all cars offered to it by any of the companies which it serves, and the transportation service which it renders is in every instance a part of the service contracted for by a shipper. The fact that the shipper must contract for the service through another carrier is immaterial. The distinctive feature is this, any shipper may at any time command the transportation services of the railway company. It is bound to serve not only the owning companies, but all other companies similarly situated, upon a tariff basis approved by the Railroad Commission; and no doubt, should still other railroad companies tender it cars for transportation, it would also be obliged to accept and transport such cars under its tariffs. The fact that it settles with the owning companies under special contracts is not significant in this connection. It may not decline to render the service which it is equipped to perform and which it holds itself out as being ready, able, and willing to perform, whether that service be for the owning companies or for other companies. It is not so much the extent of the use which the public may make of the facilities owned and operated by the railway company which is determinative of its true character, as it is the right of the public to require the services which the railway company is equipped to perform. Union Line Co. v. Railroad Comm., 144 Wis. 523 129 N. W. 605; Tap Line Cases, 234 U. S. 1, 24, 34 Sup. Ct. 741, 58 L. Ed. 1185. Here, the right of all shippers to have the services of the railway company in the transportation of property for hire makes it a common carrier.

All of the service which the railway company renders is in part performance of a contract of shipment made by a common carrier and in completing the contract of carriage it does its work in exactly the same manner that the railroad companies would do it if they operated their own cars and engines over its tracks. For convenience it transacts a part of the common carrier business of the companies which it serves under a separate organization.

It is equipped to perform a limited service, but everything it does do, it does in the transportation of persons and property for hire exactly as any common carrier would perform the same service. The fact that

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the terminal service in some instances is rendered under a special contract at cost does not change the nature of the operation by which it is rendered. The hazards to which the employees of the railway company are exposed are the hazards common to the employees of all steam railroads operated by common carriers.

[5] The railway company not only operates in the same manner that a common carrier operates, but it is a common carrier, and we are persuaded that the language of the act was used advisedly by the Legislature, particularly upon a consideration of the state of the law at that time, including the provisions of our statutes, and a history of the provisions of the Workmen's Compensation Act relating to railroad companies. The Workmen's Compensation Act was chapter 50 of the Laws of 1911. Section 2394—3 of that act contains the following provisions:

"Except as regards employees working in shops or offices of a railroad company, who are within the provisions of subsecution 9 of section 1816 of the statutes, the term 'employer' as used in sections 2394—1 and 239—2 shall not include any railroad company as defined in subsection 7 of said section 1816," etc.

Section 1816 relates to the liability of a railroad company for personal injuries sustained by its employees, and by subsection 7 a railroad company is defined as follows:

"Any company, association, corporation, or person managing, maintaining, or in possession of a railroad in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver."

"Employer" was defined by section 2394—5 as follows:

"(2) Every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under sections 2394—1 to 2394—31, inclusive, may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of sections 2394—1 to 2394—31, inclusive, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section."

On the 31st day of May, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company filed an election whereby it attempted to become subject to the provisions of chapter 50 of the Laws of 1911, and in Minneapolis, St. P. & S. M. R. Co. v. Industrial Commission, 153 Wis. 552, 141 N. W. 1119, Ann. Cas. 1914D, 655, it was held that the railroad company might accept the act as to all its employees, and that it was not limited by the act to that class of employees described in subsection 7 of section 1816, being shop and office employees. The court said:

"The Compensation Act * * * affords railway companies competency to come under it, placing all their employees on the same favored plane as other employees in industrial pursuits."

[6] Whether the employees or the railroad companies moved we do not know, but at the next session of the Legislature the law was amended by chapter 599 of the Laws of 1913, and the provision subdivision 3 of section 2394—8 was re-enacted by the Laws of 1915, c. 316, the material provisions of which are hereinbefore stated. The language under consideration came in by way of amendment after the subject had been reconsidered. We must assume that the words of the amendment were chosen with reference to their established legal meaning. What did the term "common carrier" as there used include?

In State ex rel. Northwestern Coal Ry. Co. v. Willcuts, 140 Wis. 448, 122 N. W. 1048, decided August term, 1909, this court had under consideration the question whether or not the property of the Northwestern Coal Railway Company within the city of Superior was subject to local taxation. That company had about eight miles of tracks, includ-

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ing its switch tracks, and its principal business was taking empty cars to the dock and returning them loaded with coal to the connecting railways, the connecting railways being the four companies which own the railway company whose rights are in question here. There, as here, it was insisted that, although organized as a railway company, it was operating its railroad for a private and not for a public purpose. It was there said:

"Under the law in relation to the subject under consideration, the question is whether the property is necessarily used for a public or quasi public purpose in order to enable the plaintiff to perform its duty as a common carrier. * * *"

The court further said:

"The mere fact, however, that a large part of the business of plaintiff was done for the Pittsburg Coal Company in which it is interested did not deprive plaintiff of its character of common carrier or render its property devoted to a private use so long as it was in fact organized as a common carrier and serving the public in that capacity, although to a limited extent because of location and conditions which limited such service. * * * Whether the property of plaintiff is devoted to a public use is not determined by the extent of the use, but by the right of the public generally to use it, and the fact that it is used for public purposes by all who desire to use it.

"Upon the admitted facts as they appear from the record we see no escape from the conclusion that the plaintiff was a common carrier and its property devoted to a public use, and, though limited in the extent of such business, it was doing the business of a common carrier. Its road and switch tracks were subject to use by all the public. The road carried for the public generally between its termini, the coal dock, and several other railroads." State ex rel. Northwestern C. R. Co. v. Willcuts, 140 Wis. 448, 453, 454, 122 N. W. 1048, 1050.

It is strenuously insisted that this case involved a question of taxation, and that it was necessary to go no further than to hold that the property of the company was devoted to a public use, and that the decision should be so limited. Whether that be true or not, the use of the words "common carrier" shows how it was commonly used and understood at that time. We need not go further.

In 1909 two cases involving substantially the same question involved in this case had been decided in the federal courts, United States v. Sioux City Stockyards Co. (C. C.) 162 Fed. 556, and Union Stockyards Co. v. United States, 169 Fed. 404, 94 C. C. A. 626; and after the enactment of chapter 50 of the Laws of 1911, and before the amendment by chapter 599 of the Laws of 1913, the case of the United States v. Union Stockyards Co. was decided by the Supreme Court of the United States. The gist of the cases is set forth in a statement made by Mr. Justice Van Devanter while a circuit judge, found in 169 Fed. 404, 94 C. C. A. 626, and restated with approval in 226 U. S. at 305, 33 Sup. Ct. 88, 57 L. Ed. 226, as follows:

"Its [the stockyards company's] operations * * * include the maintenance and use of railroad tracks and locomotives the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little signifi-

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cance that the stockyards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

In Texarkana & Ft. S. R. Co. v. Rosebrook-Josey Grain Co., 52 Tex. Civ. App. 156, 114 S. W. 436, the same question was before the Court of Civil Appeals of the state of Texas, which held that a railroad company switching cars from its switch tracks to and from warehouses situated on its spurs and switches and delivering them upon the transfer tracks of other railroad companies in the same town was a common carrier while engaged in such business.

[7-10] We must presume that the Legislature adopted the language here under consideration with a full understanding of its established legal effect, particularly as used in our statutes and decisions, and it can scarcely be douted that when it said in 1913 that the Workmen's Compensation Law, which, prior thereto, was held to apply to the employees of all railroad companies, was amended so as to exclude employees of all railroad companies operating steam railroads as common carriers, it intended to exclude the employees of the railway company along with the employees of all other companies organized as railroad companies and doing business as common carriers. With the policy of the law we have nothing to do; that is a matter for the consideration of the Legislature. There all parties in interest can be heard; here they cannot. We consider here the construction of the language used by the Legislature. It is our duty to interpret, not to legislate. The words of the act are plain and unambiguous. While the railway company does not do all that some common carriers do, everything done by it is done as a common carrier; it is therefore operating a steam railroad as a common carrier.

[11] We are referred to Brooklyn Eastern Dist. Terminal v. United States, 239 Fed. 287, 152 C. C. A. 275, decided January 9, 1917, and to United States v. Union Pacific R. Co., 213 Fed. 332, 130 C. C. A. 34, as decisive of the question that the railway company is not a common carrier. It is there laid down that the test is whether or not shippers and consignees have contractual relations with the terminal. With all due deference, we do not think the test laid down is the correct test. We think the correct test is that stated in Northwestern Coal Ry. Co. v. Willcuts, 140 Wis. 448, 122 N. W. 1048, and approved in Tap Line Cases, 234 U. S. 1, 24, 34 Sup. Ct. 741, 58 L. Ed. 1185; that is the right of the public to use the railroad's facilities and to demand service of it, rather than the extent of its business, is the real criterion determinative of its character. In this case the railway company cannot limit the right of any shipper to use its facilities, and the facts that the shipper must contract for its service through the agency of another company is immaterial. The fact that any shipper can make a contract by virtue of which the railway company under its tariffs is obliged to render the service contracted for is the material thing. This rule was laid down by this court prior to the enactment of the amendment in question, and we see no reason why it should be overruled or amended. Neither do we think the principle that a railroad may be a common carrier of merchandise, but is not a common carrier of common carriers of merchandise (Donovan v. Penn. R. Co., 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140, and Pullman Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29, L. Ed. 499, and Express Cases, 117 U. S., 1 Sup. Ct. 542, 628, 29 L. Ed. 791) is in any way applicable. The railway company contracts and holds itself out by its tariffs as being ready, able, and willing to perform the service of delivering to destination all persons and property delivered to it in cars, and for such service it receives compensation. Manifestly what it receives compensation for is the transportation of persons and property.

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[12] It appears that the railway company accepted the provisions of the Workmen's Compensation Act, and that since its enactment many adjustments have been made with its employees in accordance with its provisions. While this practical construction of the act given it by the Industrial Commission might be of weight if the meaning of the statute were doubtful, a practical construction, however long adhered to, cannot override the plain terms of the statute. Smith v. State, 161 Wis. 588, 155 N. W. 109; Burkhardt M. & E. P. Co. v. Hudson, 162 Wis. 361, 156 N. W. 1011.

[13] The trial court found itself bound by the established rule that findings of fact of the Industrial Commission must be upheld if supported by any substantial credible evidence. This is an incorrect application of the rule. The question involved here is not one of fact but of law. The amount of business done and the method of transacting it are questions of fact; whether the business so transacted is that of a common carrier or a private carrier is a question of law, and courts are not bound by the decisions of administrative bodies in regard to constitutional and legal questions. Wisconsin Telephone Co. v. Railroad Commission, 162 Wis 383, 156 N. W. 614, L. R. A. 1916E, 748.

[14] It is also argued that the appellant by appearing before the Industrial Commission waived his right to object to the jurisdiction of the commission. If the Industrial Commission had no jurisdiction of the subject-matter, which is the question here involved, there being no claim that the employee had accepted the provisions of the act as amended, the parties could not even by stipulation confer jurisdiction. 15 C. J. 802, par. 101, and cases cited.

[15] After the enactment of chapter 50 of the Laws of 1911 the railway company elected to come under the act. As the act then stood, this brought employees under the act unless they filed a withdrawal. The plaintiff never filed a withdrawal, but his employment with the railway company was intermittent, although during the greater part of the time since 1911 he has been employed by the railway company. The act as it stood at the time of plaintiff's injury provided that it should not apply to employees of a railroad company operating a steam railroad as a common carrier, "unless both employer and employee shall specifically in writing have voluntarily accepted the provisions of said sections (the Compensation Act) and have filed notice thereof with the Industrial Commission," etc.

Where the employment has not been continuous and no election has been filed by the employee subsequent to the amendment, the employee is not subject to the provisions of the act. Whether or not he would be if his employment had been continuous we do not decide. The fact that the plaintiff may have been under the Compensation Act by reason of the election of the railway company made prior to the amendment is not sufficient to place him under the act as amended, under the facts and circumstances in this case. It appears that the railway company has elected to be subject to the act as amended. If any one or all of the employees desire the benefit of the act, an election may be filed and notice given, and as to any injury occurring subsequently the act will apply.

The judgment of the cricuit court is reversed and the cause is remanded, with directions to enter judgment setting aside the award and directing dismissal of the application.

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UNITED STATES CIRCUIT COURT OF APPEALS.

NINTH CIRCUIT.

ALASKA TREADWELL GOLD MINING CO.

v.

CRINIS. (No. 3212.)*

2. MASTER AND SERVANT—EVIDENCE OF RELATION—MATERIALITY.

In an action against a mining company for compensation for the death of an employee, on the issue whether deceased was an employee of defendant the pay roll of another company, made out by a bookkeeper, and which deceased did not sign nor see, *held* properly excluded as immaterial.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

3. MASTER AND SERVANT—NOTICE OF ACCIDENTS—ALASKA COMPENSATION LAW.

Provision of Alaska Workmen's Compensation Law, § 9, requiring an employer who has been furnished by the employee with the names and addresses of his beneficiaries to notify them of his death, *held* to apply to an employer which, with other companies, hired men through a common agent, who was furnished with such statement.

(For other cases, see Master and Servant, Dec. Dig. § 397½, new, vol. 7 A, Key-No. series.)

In Error to the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Action at law by Catherine Crinis against the Alaska Treadwell Gold Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hellenthal & Hellenthal, of Juneau, Alaska, for plaintiff in error.
J. H. Cobb, of Juneau, Alaska, for defendant in error.

Before Gilbert, Ross, and Hunt, Circuit Judges.

HUNT, Circuit Judge. Section 9 of the Alaska Compensation Act (Session Laws Alaska 1915, p. 146), provides that, where a person claims to be a beneficiary entitled to compensation under the act, such beneficiary or some one in his or her behalf shall within 120 days from and after the death of such employee serve a written notice upon the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and certain other matters not now material. It is also provided that:

"Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this act."

After providing for a method of service upon the employer the section ends with the following sentence:

"* * * Except in the cases in this section otherwise expressly

* Decision rendered, February 3, 1919. 255 Fed. Rep. 810.

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provided, no action or other proceeding to recover such compensation shall be brought or maintained, nor shall any claim for such compensation be filed or allowed as hereinafter provided unless such notice shall have been served in the manner and within the time herein provided."

In the complaint filed by Catherine Crinis, widow of Nicholas P. Crinis, it was set up that Nicholas Crinis was killed about June 30, 1916, while in the employ of the Alaska Treadwell Gold Mining Company, and left a widow and five children; the children being under the age of 16 years. There was no allegation that any notice of claim had been served upon the defendant. The mining company demurred, but the court overruled the demurrer. The matter went to trial upon the direct issue whether Nick Crinis at the time of his death was an employee of the defendant mining company.

In the course of the trial defendant offered to prove that no notice had been served upon it by the plaintiff or any one in her behalf stating that she was a beneficiary. The court excluded such evidence upon the ground that that was not part of the right, but was a matter of affirmative defense, which had not been pleaded in the answer of the mining company. The jury found specially that at the time of his death Crinis was an employee of the Alaska Treadwell Gold Mining Company. Judgment was entered in favor of the plaintiff, and by writ of error the case is brought here for review.

[1] Error is assigned because the court in the course of the examination of several of the plaintiff's witnesses permitted them to answer questions substantially in this form:

"What was Crinis' occupation, and in whose employ was he at the time he was killed?"

Considering the issue, we think the court should have sustained objections to the questions. But inasmuch as the witnesses testified in detail as to where and how the miners were employed, who paid them their wages, what the method of transacting business was, who was president and who was employment agent of the several mining companies of which group the plaintiff in error was one, there was no prejudice to the rights of the plaintiff in error. It was in evidence that plaintiff in error, the Alaska United Gold Mining Company, and the Alaska Mexican Gold Mining Company had the same officers and were intimately associated in business conduct; that purchases were made by the companies from the Alaska Treadwell Company; that the Alaska Treadwell acted as a banker; that the offices of the several companies are combined; that the bookkeeping is all done in one department and one place, and the cash all disbursed by one man, each company contributing to the Treadwell Company the amount of cash the Treadwell Company has advanced on its account. The men were employed by one employment agent, whose office had but a single sign, "Employment Office" over the door, and the men were then directed as to what mines they were to work in. Crinis was killed in the Ready Bullion mine, operated by the Alaska United Gold Mining Company and was paid some money by that company very shortly before his death. As all these matters bore upon the issue whether or not deceased was an employee of the plaintiff in error, and the court carefully instructed the jury that the issue was whether Crinis was an employee of the plaintiff in error or of the Alaska United Company, the answers which became opinions of the witnesses that the deceased was in the "employ" of the plaintiff in error at the time of his death could not have misled the jury.

[2] It is said that the court erred in refusing the offer of the pay roll of the Alaska United Gold Mining Company. Counsel for the plaintiff below objected to the introduction of this paper because it was not signed by Nick Crinis, and he particularly objected to all of the pay roll except for the months of June and July, 1916. We think the court correctly excluded the pay roll, because it did not bear the signature of

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Crinis. He never saw it; it was made up by the bookkeeper of the Alaska United Gold Mining Company. It was immaterial. Furthermore, counsel for the plaintiff below in his final objection did not attempt to exclude the offer of such pay rolls for June 30th and July 1st, but counsel for plaintiff in error made no further attempt to have the pay roll of these particular dates put before the jury, and the court made its ruling as to the whole pay roll which evidently covered a long period of time.

[3] It is contended that failure by the beneficiary or some one in her behalf to serve notice called for by the statute precluded the filing or allowance of any claim for compensation, as well as any action to recover such compensation. We are convinced that the plaintiff in error cannot take advantage of this point and for this reason. The plaintiff in error, as well as the other mining companies heretofore referred to, had a common employment agent. He testified that Nick Crinis at the time of his death was not in the employ of the Alaska Treadwell Company; that there had been furnished to witness as employment agent, through the foreman of the Ready Bullion mine, a card statement showing the names of those who would be entitled to benefits under the provisions of the statute herein involved in case he should die as a result of an injury received by him arising in the course of his employment. This statement appeared to be signed by Nick Crinis, although in the opinion of the employment agent Crinis himself did not make the signature. However that may have been, the employment agent certified that the answers to the questions on the card had been made by Crinis in his presence, and undoubtedly the card was accepted and filed by the employment agent, representing his principals, as to who the beneficiaries of Crinis would be in case of his death.

The first paragraph of section 9 of the statute provides that every employee, when he is employed, or thereafter, shall furnish a written statement showing the names of the persons who would be entitled to benefits under the provisions of the act, in case he should die. In all cases where the statement referred to is furnished the employer by the employee, the employer shall, if the employee be killed as a result of an injury received in the course of his empoyment, notify each beneficiary named in the last statement of the fact of such death. The form of notice is included in the statute, and it is provided that a failure on the part of the employee to supply the employer with a statement as provided shall not work a forfeiture of the right of his beneficiaries to benefits under the statute, but shall relieve the employer of all obligation to give to any of the beneficiaries of such deceased employee notice of the fact that the employee is dead. The statute continues:

"In cases where the employer shall have been furnished with such statement or statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and in the manner: * * * Provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claim to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of 120 days from and after the time that the employee became deceased."

Now, if Crinis when he was killed was an employee of the Alaska Treadwell Company, and the verdict of the jury is that he was, and the statement already referred to was accepted by the employment agent of that company acting for such principal, then we have a situation where the Alaska Treadwell Company, employer, failed to notify the beneficiaries named in the statement within the time required by the statute, or at all, after the employee was killed, in which event the beneficiaries named in the statement and who were not notified had the right, not only to notify the employer of their claims and to file claims, but also to

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"prosecute actions or other proceedings for the recovery thereof," notwithstanding the fact that notice to the employer was not served within 120 days from and after the time that Crinis, the employee, was killed.

Counsel have urged that, if it is held the Alaska Treadwell Company is liable under the circumstances of the case, it is to hold practically that the plan under which the several mining companies referred to are operated must be abandoned. We cannot agree that any such result must follow a general plan of employment of the same persons as officers by the several mining companies. It would seem to be quite simple for such an employment agent, when he acts in employing a man, to make it perfectly plain to the employee for which company the agent is acting, and for which the employee is to work.

Judgment affirmed.

SUPREME COURT OF CALIFORNIA.

SAN FRANCISCO-OAKLAND TERMINAL RYS.

v.

INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8921.)*

1. MASTER AND SERVANT—FINDINGS OF INDUSTRIAL ACCIDENT COMMISSION—REVIEW.

Findings of fact by the Industrial Accident Commission on conflicting evidence are conclusive on the courts.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RELATION—"EMPLOYEE."

Where one carrier employed a watchman at a crossing and another company operating a parallel track paid one-half of salary of watchman, who acted for both companies, relation of employer and employee, within the meaning of the Workkmen's Compensation Act, existed between each railroad and watchman.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

3. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—JURISDICTION OF ACCIDENT COMMISSION.

Where interstate and intrastate carriers had parallel tracks, and each paid half of salary of a watchman at a crossing, and watchman was killed by a train of interstate carrier at a time when a train also came by for intrastate carrier, jurisdiction of state Industrial Accident Commission was not lost as to intrastate carrier by reason of federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

(For other cases, see Master and Servant, Dec. Dig. § 365.)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RELEASE.

Where watchman was killed while acting at a crossing for both an intrastate and an interstate carrier, and his wife executed a written release to interstate carrier in consideration of a certain amount, release, in

* Decision rendered, March 4, 1919. 179 Pac. Rep. 386.

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so far as any claim under the Workmen's Compensation Act was concerned, was invalid as against the intrastate carrier, where it did not provide for payment of full compensation in accordance with provisions of act and was never approved by commission.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

In Bank.

Proceedings under the Workmen's Compensation Act by Abigail M. Robinson to obtain compensation for the death of her husband, Washington L. Robinson, opposed by the San Francisco-Oakland Terminal Railways, employer. There was an award in favor of the applicant, and the employer brings certiorari. Award affirmed.

W. H. Smith, of Oakland, for petitioner.
Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding in certiorari having for its purpose the annulment of an award in favor of Abigail M. Robinson against petitioner for death benefit and burial expense on account of the death of her husband, Washington L. Robinson, who was killed as the result of an accident occurring in the course of his employment and arising out of his employment as a crossing watchman at the crossing of Shattuck avenue and Bancroft way, in the city of Berkeley.

The proceeding before the commission was against both petitioner and the Southern Pacific Company, upon the theory that they were both the employers of deceased. The findings of the commission substantially declare that on January 20, 1918, deceased "was in the service, other than as an independent contractor, jointly of defendants * * * as a flagman at a certain street crossing"; that his duties in said employment were to warn and signal indiscriminately the operators of the trains of both defendants as to vehicles and pedestrians at or approaching said street crossing and to warn and signal pedestrians and the drivers of vehicles as to the approach at said crossing of the trains of both defendants; that at the said time and place, while engaged in rendering service for both of said defendants, the employee sustained an injury, to wit, he was struck accidentally by a passing train of said Southern Pacific Company while engaged in flagging; that such injury arose out of and in the course of "his joint employment by said defendants" and was proximately caused thereby; "that said injury proximately caused death on the 23d day of January, 1918," and "that the earnings of the employee in said employment at said time were $45 per month, one-half whereof was paid by each defendant." It was further found that the system of the Southern Pacific Company at said crossing was "at all times engaged indistinguishably in interstate and suburban traffic, and therefore as to said defendant the employee was engaged in interstate commerce," with the result that as to the Southern Pacific Company the commission was without jurisdiction. The award therefore was made solely against petitioner.

We construe these findings as sufficiently declaring that at the time of the accident deceased was in the employ of both defendants, that at the time of the accident he was actually engaged in rendering service for both of the defendants, and that his injury arose out of and in the course of said employment while rendering such service. They sufficiently show the relation of employer and employee within the meaning of the "Workmen's Compensation, Insurance and Safety Act" (St. 1917, p. 831), which defines an employer as one "who has any person in service under any appointment or contract of hire, * * * express or implied, oral or written * * *" (section 7), and an employee as "every person in the service of an employer as defined by section seven hereof under any

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appointment or contract of hire, * * * express or implied, oral or written * * *" (section 8), as well as under the general law.

It is earnestly urged that the evidence received by the commission fails to furnish any support for a conclusion that the relation of employer and employee existed between petitioner and deceased, or that deceased was injured while engaged in any service for petitioner. The situation in this connection was as follows:

Both petitioner and the Southern Pacific Company operated suburban electric lines to and through parts of Berkeley; the interstate character of the Southern Pacific Company being based on the fact that interstate passengers and freight, as well as United States mail, were carried on its trains. At and near the place of the accident the tracks of both companies are along Shattuck avenue, a street running in a northerly and southerly direction. Each company has two tracks, and the four are parallel, the two Southern Pacific Company tracks being on the westerly side of the avenue, and there being about 15 feet between the two sets of tracks. These tracks run along Shattuck avenue, across its intersection with Bancroft way, and then on along Shattuck avenue northerly. Just across this intersection, on the northerly side, is a stopping place or station for both systems. The evidence shows very clearly that, acceding to a request of the Berkeley authorities made for the purpose of giving protection to pedestrians and vehicles passing over the tracks of the two companies at certain street crossings, including that of Shattuck avenue and Bancroft way, the two companies had entered into an oral understanding several years before under which the Southern Pacific Company was to place crossing watchmen at such crossings, and bill one-half the wages of such watchmen to petitioner. This arrangement had been faithfully complied with from the time it was made up to and including the time of the accident, and the Southern Pacific Company had each month rendered its bill to petitioner for one-half the wages of each man so employed, and petitioner had each month paid such bill. At the time of the accident and for some weeks prior thereto deceased was the crossing watchman so installed at the Shattuck avenue-Bancroft way crossing. While the two systems of railroad were absolutely separate and distinct, the duties of these watchmen were absolutely the same as to each, and they were so instructed. But they were directly selected and employed by the Southern Pacific Company, were carried on the pay roll of that company for all of their wages, were directly paid all of their wages by that company, were under the supervision of that company in the performance of their duties, and that company alone exercised directly the power of discharge, though it was admitted that such power would be exercised as to any watchman whose discharge was insisted on by petitioner.

The accident occurred about 5:57 p. m. on January 20, 1918. Trains of both companies going north arrived at the Shattuck avenue-Bancroft way station about the same time; petitioner's train being a little ahead of the other. Deceased was standing near the west rail of the track of the Southern Pacific Company, on which the train of that company approached, facing east, apparently in the discharge of his duties as crossing watchman, and apparently looking in the direction of petitioner's train. The evidence is not entirely in accord as to the relative position of the trains at the moment of the accident, but in view of the findings we must consider it in the light most favorable to the claimant. According to some of the evidence, the trains came in practically together, the head of petitioner's train being only about half a car length ahead going "into the station," and stopped at the same time in that relative position. Deceased was apparently standing too near the Southern Pacific Company track, and was struck by the first car, and thus received his injury.

[1] The evidence is in such condition as to fairly warrant a conclusion that at the time of the accident deceased was actually engaged in his duties

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as crossing watchman with reference to the two trains which were then arriving, and so was actually engaged, as found by the commission, in rendering service, in the course of his employment, for both of the defendants. It is true that there was other evidence tending to show that petitioner's train had arrived earlier than indicated by the evidence above referred to, and that the duties of deceased in connection therewith had ended before the accident, but, upon the whole case, that was a question of fact for the commission, and its finding is conclusive in so far as the courts are concerned.

[2] We are also of the opinion that, upon the facts we have stated, the commission correctly held that deceased was in the employ of both companies, and that therefore the relation of employer and employee existed between deceased and petitioner. This appears to us to necessarily be the result of the arrangement between the companies and their course of conduct thereunder. The deceased was engaged to perform his service for both companies, and was in reality paid his wages by the two companies, each paying one-half. That he was selected for this service by the Southern Pacific Company, was placed on its pay roll as its employee, was under its supervision, direction, and control, and was given his wages by it, was simply the result of the arrangement between the two companies as to the method by which the thing contemplated should be done. In all this, including the contract of employment, the Southern Pacific Company was acting on behalf of petitioner as well as itself, and in no respect as an independent contractor. We cannot see, looking at the substance of the transaction, why petitioner and deceased did not fully measure up to the definitions of employer and employee contained in our "Workmen's Compensation, Insurance, and Safety Act." That such is the situation under the general law to which it has been held "we must look" in determining such questions (see Employers' Liability, etc., Co. v. Industrial Accident Commission, 177 Pac. 273) is fully sustained by such cases as Vary v. B. C. R. & M. R. Co., 42 Iowa, 246, and Atlanta Coast Lines R. Co. v. Tredway's Adm'x, 120 Va. 735, 93 S. E. 560. None of the cases cited by petitioner is in point upon such facts as we have in this case.

[3, 4] Although petitioner is not a common carrier by rail engaged in interstate commerce, it is claimed that, if deceased was at the time of the accident rendering service for both petitioner and the Southern Pacific Company, which was engaged in interstate commerce, his service as to the latter being of an interstate character, that character must attach to the whole of his service, and thus, in view of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]) exclude the jurisdiction of the state commission, even as to the petitioner, which is not engaged in interstate commerce. This claim loses sight of the fact that the service as to each company, though confused in point of time of rendition, was absolutely separate and distinct in every other way. For one company he was doing one thing, and for the other company an entirely different and distinct thing, and his service for petitioner had no element of an interstate character. The claim further loses sight of the fact that the jurisdiction of the state commission is excluded by the federal Employers' Liability Law only as to such matters as are covered by the act, and necessarily the federal act cannot be held to affect the rights under the state law of an employee of a common carrier by railroad in no way engaged in interstate commerce, or the rights of his dependents in the event of his death, to obtain compensation under such state law on account of injuries or death occurring in the course of his employment by such carrier, and arising out of such employment.

[5] It is suggested, though not argued by petitioner in his briefs, that a release given by the claimant to the Southern Pacific Company had the effect of releasing petitioner. It appears that, prior to the commencement

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of this proceeding before the commission, the claimant, in consideration of $250 paid her by such company, executed a written release of the company from all claims and causes of action on account of the death of her husband. This amount was credited by the compensation to petitioner in its final award, thereby reducing the full compensation of $1,539 by $250. The release did not "provide for the payment of full compensation in accordance with the provisions of" the act, and it was never "approved by the commission." In so far as any claim under the Workmen's Compensation, Insurance, and Safety Act is concerned, it was therefore invalid (section 27), and it is material only in considering any claim that may be asserted against the Southern Pacific Company under the federal Employers' Liability Law.

No written notice was served on petitioner within 30 days after the injury to Robinson stating name and address of person injured, etc., as required by section 15 of the Compensation Act. That section provides, however, "that the failure to give any such notice * * * shall not be a bar to recovery under this act if it is found as a fact in the proceeding for the collection of the claim that there was no intention to mislead or prejudice the employer in making his defense, and that he was not in fact so misled or prejudiced thereby." The commission so found in this proceeding. Section 19 (d) of the act provides that prejudice to the employer by failure of the employee to give notice, as required by section fifteen" is an affirmative defense, and that "the burden of proof shall rest upon the employer to establish them." In the light of these provisions it certainly cannot be held that the finding of the commission is without sufficient support in the evidence.

What we have said disposes of all points in the briefs as to which discussion is necessary.

The award is affirmed.

We concur: Shaw, J.; Melvin, J.; Wilbur, J.; Lennon, J.; Lawlor, J.; Olney, J.

DISTRICT COURT OF APPEAL OF CALIFORNIA.

FIRST DISTRICT, DIVISION 1, CALIFORNIA.

GAMBLE

v.

SUPERIOR COURT IN AND FOR ALAMEDA COUNTY ET AL.

(Civ. 2690.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INDUSTRIAL ACCIDENT COMMISSION—AWARD—STAY OF EXECUTION.

The Industrial Accident Commission, being a court of limited jurisdiction, cannot take cognizance of an application for an order staying execution on a judgment entered on its award brought by one who had not joined in any proceedings before it nor had questioned the validity of its award prior to final adjudication and affirmance by the upper courts.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

*Decision rendered, Feb. 10, 1919. Rehearing denied by Supreme Court April 10, 1919. 179 Pac. Rep. 717.

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2. MASTER AND SERVANT—JURISDICTION OF SUPERIOR COURT—RESTRAINING ISSUANCE OF EXECUTION ON AWARD OF INDUSTRIAL ACCIDENT COMMISSION.

Equity has jurisdiction of a suit to enjoin a successful claimant before the Industrial Accident Commission from enforcing the award by execution or other process.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION—JURISDICTION TO RESTRAIN EXECUTION OF AWARD OF INDUSTRIAL ACCIDENT COMMISSION.

The superior court is not deprived of jurisdiction to restrain execution on an award of the Industrial Accident Commission, by Workmen's Compensation Act, § 84, subsec. "d," providing that no court shall have jurisdiction to annual any order, decision, or award of the commission or suspend or delay the operation or execution thereof, where application is made by a stranger to proceedings before the commission on an extrinsic showing that enforcement of the judgment would be a fraudulent violation of the judgment creditor's contract with such applicant.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½].)

Petition by George Gamble against the Superior Court of the State of California in and for the County of Alameda and others for writ of mandate against the Superior Court and its judge, and against the Industrial Accident Commission. Petition dismissed as to Industrial Accident Commission, and granted as to the Superior Court and Judge.

W. G. Deal and J. Early Craig, both of San Francisco, for petitioner.
Frank Mitchell, Jr., of Hayward, for respondent Superior Court, Alameda County.

Chris. M. Bradley, of San Francisco, for respondent Industrial Accident Commission.

RICHARDS, J. This is an application for a writ of mandate to be directed to the superior court of the county of Alameda and Hon. Joseph S. Koford, one of the judges thereof, commanding said court and judge to entertain and pass upon the merits of a certain action pending in said court, numbered 54504, and entitled "George Gamble, Plaintiff, v. Helen Angus and White Gulch Mining Co., a Corporation, Defendant," and also commanding the Industrial Accident Commission of the state of California and the members thereof to stay execution upon a certain award and the judgment entered thereon in a certain proceeding instituted by said Helen Angus before said commission, fixing at the sum of $5,000 the liability of the said White Gulch Mining Company, a corporation, for the death of her husband as an employee of said corporation.

The facts upon which the petitioner relies for the relief sought in this application are briefly these: Wm. Angus was prior to October 30, 1914, the president and superintendent of the White Gulch Mining Company, of which the Pacific Coast Casualty Company was the insurance carrier. On said last named date said William Angus met with an accident while in the employ of said mining company from which his death ensued. He was at that time the owner of 12,000 of the total issue of 100,000 shares of the capital stock of said mining corporation, which was community property, and to the ownership of which his widow, Helen Angus, in due court of probate succeeded. Within the time allowed by the Workmen's Compensation Act (St. 1913, p. 279), said Helen Angus instituted proceedings before the Industrial Accident Commission against said White Gulch Mining Company and its insurer to fix liability for the death of her husband. While said proceeding was pending before the commission

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Helen Angus offered to sell her said holding of stock in said corporation to George Gamble, the petitioner herein, for the sum of $7,500, but said Gamble informed said Helen Angus that he would not purchase said stock if said White Gulch Mining Co. was required to pay anything on account of any liability growing out of the death of her husband; whereupon said Helen Angus represented and promised to said petitioner that she would not look to said White Gulch Mining Company for or on account of said liability; and, relying upon her representations and promises in that regard, the petitioner purchased her said stock, paying therefor the sum of $7,500, and he is still the owner and holder of said stock. That, notwithstanding her said representations and promises, said Helen Angus has proceeded to obtain an award from said commission against said White Gulch Mining Company for the sum of $5,000, and has proceeded to cause a certified copy of the findings of the commission and of said award to be filed in the office of the county clerk of the county of Mariposa, and a judgment for said sum against the said White Gulch Mining Company to be entered thereon, upon which judgment she now threatens to have an execution issued and enforced against the property of said corporation, to the petitioner's irremediable injury.

The foregoing facts were presented in the complaint filed in the superior court of the county of Alameda in the action above referred to as having been instituted therein, and thereupon petitioner, as plaintiff therein, moved said court for the issuance of a preliminary injunction restraining said Helen Angus, as one of the defendants therein, from causing to be issued an execution upon the judgment entered upon the award of the commission, and taking any further proceedings for the enforcement thereof. The Hon. Joseph S. Koford, as judge of said court, refused to consider or pass upon the merits of said motion upon the sole ground that the said court had no jurisdiction of said matter, by reason of the provisions of subsection "d" of section 84 of the Workmen's Compensation Act; that thereupon the petitioner herein presented an application, setting forth substantially the same facts to the Industrial Accident Commission praying for an order of said commission staying execution upon said judgment entered upon its award as aforesaid, but said commission also refused to entertain said application upon the ground that it had no jurisdiction in relation to the matters set forth herein. Thereupon the proceeding was instituted by the petitioner herein.

[1] As to that portion of this petition wherein the petitioner seeks to have a writ of mandate issued directing the Industrial Accident Commission to entertain and act upon the matters set forth in his application filed with that body, the subject may be briefly dismissed. We are entirely satisfied that the attitude of said commission, as set forth in its return herein, is based upon a correct view of the powers and jurisdiction of that tribunal under the act of its creation; that it is a court of limited jurisdiction, and is wholly without power or authority in matters of general jurisdiction without the scope of the Workmen's Compensation Act; that the petitioner herein, not having been a party to any proceeding before said commission in connection with its award in favor of Helen Angus and against the White Gulch Mining Company, and not having questioned the validity of said award prior to the final adjudication of the same by said commission, and its affirmance by the Supreme Court of the state of California, and also by the Supreme Court of the United States, the said application of said petitioner was in the nature of a new and original proceeding based upon extrinsic facts appearing upon the face of his said application, which were wholly without the jurisdiction of the commission to hear or determine. This being so, the application herein must be denied in so far as it relates to the respondent Industrial Accident Commission and the members thereof.

[2] In so far as the application herein seeks the issuance of a writ of mandate directing the superior court of Alameda county and the said judge thereof to entertain and hear upon the merits all matters arising

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out of the institution and pendency before it of the case of Gamble v. Angus et al., No. 54504, above referred to, a more serious question is presented. The said action is in form and in the nature of the relief sought therein an equitable proceeding, wherein the plaintiff seeks to have the defendant Helen Angus enjoined from proceeding to collect by execution or other process a judgment against a corporation in which the plaintiff is a large stockholder, which judgment the plaintiff alleges in substance to have been obtained by fraud, and the enforcement of which will result in irremediable injury to the plaintiff. The sufficiency of said complaint as a pleading is not before us, since the proper forum for assault upon it by way of demurrer or otherwise is the court wherein the action is pending. With respect to said action we are of the opinion that it is one of a class of actions which courts of equity have heretofore and elsewhere taken cognizance of, and assumed jurisdiction and power to grant relief in. Givin v. Times, etc., Pr. Co., 114 Fed. 92, 52 C. C. A. 40. It is, however, the contention of the remaining respondent herein, the superior court and the judge thereof, that said court has been bereft of whatever jurisdiction it might have formerly possessed in matters of this character by virtue of the terms and effect of subsection "d" of section 84 of the Workmen's Compensation Act, which, so far as applicable to the question before us, reads as follows:

"No court of this state (except the Supreme Court and the District Courts of Appeal to the extent herein specified) shall have jurisdiction to review, reverse, correct or annual any order, decision or award of the commission or to suspend or delay the operations or execution thereof, or to restrain * * * or interfere with the commission in the performance of its duties."

In considering the application to be given the foregoing provision of the Workmen's Compensation Act to the facts of the case before us, it is to be noted that neither the Industrial Accident Commission nor any of its members is a party to the action pending in the said superior court, and that in such action no attempt is being made to review, reverse, correct, or annual any order, decision, or award of the commission, or to restrain or interfere with the commission in the performance of its duties; and it is to be further noted that said action has not been instituted by a person who was a party to any proceeding before said commission or to any award which it has made, or to any judgment which has been obtained upon the making of such award; nor was said action b ought by any person who would have been entitled to appear before said commission in the said proceeding before it, or to apply therein for a rehearing or reversal of its award, or to have obtained relief therefrom by way of a writ of review issued out of the supreme or appellate courts. The question before us, reduced to its final analysis, is as to whether the phrases in the foregoing provision of the Workmen's Compensation Act assuming to deny to the courts of this state jurisdiction "to suspend or delay the operation or execution of any order, decision, or award of the commission is to be given such breadth of application as to cover a case wherein a stranger to the proceeding theretofore pending before said commission seeks in a court of equity, upon a showing of extrinsic facts, to restrain the party who has obtained such award and who has caused to be entered a judgment thereon, from enforcing such judgment by execution in fraudulent violation of her contract not to obtain and not to enforce such award and judgment to the plaintiff's injury.

[3] We are of the opinion that a reasonable and proper interpretation of this clause of the Workmen's Compensation Act does not lead to its extension thus far; for to hold otherwise would be to so construe it that no agreement or arrangement made by a stranger to the record with the applicant obtaining an award from the commission, to the effect that it would not be enforced to his injury, could be availed of in a court of equity otherwise rightfully empowered to enjoin the violation of such an agreement. Suppose, for example that the party obtaining an award

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against an employer enforceable against the latter's property should agree with another, not a party to the proceeding, for a consideration to be applied on account of the award, to release a certain specified portion from the employer's said property from the effect of the award and of any execution to be issued thereon, and, having received such consideration, should proceed to levy upon such released property; would the person thus fraudulently affected be powerless to seek and obtain relief in a court of equity by virtue of this clause of the Workmen's Compensation Act? Or that the execution of this award were attempted to be levied upon property standing in the name of the employer, but of which the entire equitable interest and ownership was in another; would that other be cut off from seeking equitable relief against the sale of his property upon such execution by the terms of this clause in the act? We are not disposed to give to its terms a construction which would thus utterly divest courts of equity from entertaining actions of the character of those above indicated. The instant case falls in this category, and is one over which the superior court, which is the respondent herein, has jurisdiction, notwithstanding the foregoing provisions of the Workmen's Compensation Act.

It follows that as to it and the said judge presiding over it the writ should issue.

The petition herein as to the Industrial Accident Commission and its members, is dismissed, and as to the said superior court and the judge thereof is granted. Let the writ issue accordingly.

We concur: Waste, P. J.; Kerrigan, J.

SUPREME COURT OF ILLINOIS.

UNION BRIDGE & CONSTRUCTION CO.

v.

INDUSTRIAL COMMISSION ET AL. (No. 12512.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION —EXTRATERRITORIAL OPERATION OF ACT.

The Workmen's Compensation Act of Illinois does not authorize compensation for the death of a person by drowning in the Ohio river while at work on a caisson attached to the river bed outside of the state boundary.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

Error to Circuit Court, Massac County; William N. Butler, Judge.

Proceeding under the Workmen's Compensation Act by Mamie Williams to recover compensation for the death of Eloy Williams, opposed by the Union Bridge & Construction Company, employer. An award by the Industrial Commission was confirmed by the Circuit Court on certiorari, and the employer brings error. Reversed and remanded, with directions.

* Decision rendered, Feb. 20, 1919. Rehearing denied April 4, 1919. 122 N. E. Rep. 609.

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Russell B. James, of Chicago, and Mulkey & Leonard, of Metropolis, for plaintiff in error.

Munson T. Case, of Chicago, for defendant in error.

CARTWRIGHT, J. Eloy Williams was employed by the plaintiff in error, the Union Bridge & Construction Company, which was engaged in constructing a railroad bridge acro[s] [t]he Ohio river from the city of Metropolis to the Kentucky shore. Williams was what was called a "sandhog" and worked in a gang under the direction of a straw boss called Soldier. His gang was working on bridge pier No. 4, 1,185 feet south of the lowwater mark of the Ohio river on the Illinois shore, in a caisson, taking out the sand and mud to sink the caisson in the river. On July 22, 1916, he fell into the river while walking across a gangplank connecting the pier with a barge moored thereto for the use of the sandhogs to wash up and rest and get coffee, and he was drowned. He was 19 years old and unmarried, and, his death having arisen out of and in the course of his employment, his mother, the defendant in error, Mamie Williams, applied for compensation under the Workmen's Compensation Act (Laws 1913, p. 335). The arbitrator rejected the claim, and on a review by the Industrial Commission the decision of the arbitrator was reversed, and an award made. The plaintiff in error sued out of the circuit court of Massac county a writ of certiorari, and the court confirmed the award, and certified that the cause was a proper one to be reviewed by this court.

[1] It is assigned for error that the circuit court erred in holding the Workmen's Compensation Act to apply to injuries occurring outside of the state. No law of this state has any effect as a law, by its own force, beyond the territorial limits of the state, and if it is enforced in any other jurisdiction it is by the rule of comity; but a law effective in this state as such may create rights and liabilities arising from acts occurring outside of the state. It would have been competent for the General Assembly to provide by the Workmen's Compensation Act that the employer should pay compensation for injuries suffered outside of the state. The Workmen's Compensation Act does not in specific terms limit the right to an award to accidental injuries occurring in the state, and whether it extends to such injuries must depend upon the construction of the various provisions of the act. Friedman Manuf. Co. v. Industrial Com., 284 Ill. 554, 120 N. E. 460. By article 1 of the Constitution the boundary of this state along the Ohio river is its northwestern shore, but it provides that the state may exercise such jurisdiction upon the river as it is entitled to, and by the Virginia Compact of 1789 this state may exercise concurrent jurisdiction upon the river with the state of Kentucky. The exact nature of the concurrent jurisdiction does not seem to have been adjudicated. It is a general rule that two independent political sovereignties cannot exercise legislative authority over the same place and subject at the same time, but if this state may enact laws operative on the Ohio river, the Supreme Court of the United States has limited such jurisdiction to laws relating to rights and liabilities on the river. In the case of Wedding v. Meyler, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833, that court construed the compact to mean that the two states should have concurrent jurisdiction "on" the river, but that the jurisdiction did not extend to structures attached to the river bed and within the boundry of one or the other state. In that view of the concurrent jurisdiction the employment of Williams was beyond the territorial limits of this state, and the right to compensation depends upon the question whether the Compensation Act covers such employment.

The Constitution requires that the subject of an act shall be expressed in the title, and the title of the Workmen's Compensation Act, so far as it relates to the question under consideration, is:

"An act to promote the general welfare of the people of this stat

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by providing compensation for accidental injuries or death suffered in the course of employment within this state."

It takes from the employers in hazardous occupations electing not to provide and pay compensation according to the act, various defenses otherwise allowed by the laws of this state, and provides in section 19b that upon an injury occurring, the arbitrator or committee of arbitration shall make such inquires and investigations as he or they shall deem necessary, and may examine and inspect all books, papers, records, places, or premises relating to the questions in dispute, and hear such proper evidence as the parties may submit, and the hearings before the arbitrator or committee of arbitration shall be held in the vicinity where the injury occurred. The provisions for a personal inspection by the arbitrator or committee of arbitration of the premises relating to the question in dispute was intended to furnish evidence concerning the rights of the parties and could not have been intended to apply to premises beyond the boundaries of the state without an express provision to that effect. That provision, together with the requirement as to the place of the hearing, negatives any intention to make the act effective beyond the boundaries of the state. Section 19g provides that either party may present a certified copy of the decision of the Industrial Commission when no proceedings for review have been taken, or upon a review to the circuit court of the county in which the accident occurred or either of the parties are residents, which confirms the conclusion arising from the title and section 19b.

The Compensation Act has been held, on account of its elective features, to create a contract obligation, but the obligation so created is that the employer will provide and pay compensation according to the provisions of the act, and he does not agree to provide and pay compensation for injuries not included within the act. The Supreme Judicial Court of Massachusetts in the case of In re Gould, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914B, 372, in view of the general rule that, in the absence of language to the contrary, it is not to be presumed that statutes are designed to fix the rights of parties beyond the territorial limits of the state, and finding in the language of the Massachusetts statute no intent that it should have extra-territorial effect, held that it did not apply to an injury received out of the state. There have been decisions in other states that compensation is to be awarded for injuries occurring beyond the territorial limits of the state, but they have been based upon provisions of the acts showing such a legislative intention. The decision of the Supreme Court of Indiana in Hagenback v. Leppert (Ind. App.) 117 N. E. 531, is typical of such cases. The claimant there was a hostler of a circus, and was injured in the course of his employment at Joliet, in this state, and the decision was based on section 20 of the Indiana Workmen's Compensation Act (Laws 1915, c. 106), which is as follows:

"Every employer and employee under this act, except as provided in section 19, shall be bound by the provisions of the act whether injury by accident or death resulting from such injury occurs within the state or in some other state or in a foreign country."

[2] The decision was within the rule that the act being elective in its nature, every provision of the act became a part of the contract, and the employer became bound to pay according to the terms of the act. The Workmen's Compensation Act of this state is remedial in its nature, and should be liberally construed to carry out its beneficient object; but there is no provision of the act which can be construed to authorize compensation for an injury occurring outside of the state.

The judgment of the circuit court is reversed, and the cause is remanded, with directions to quash the proceedings of the Board of Arbitration.

Reversed and remanded, with directions.

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SUPREME COURT OF ILLINOIS.

KUSTURIN

v.

CHICAGO & A. R. CO. (No. 12128.)*

2. COMMERCE — INTERSTATE COMMERCE — PERSONS ENGAGED IN.

The test of whether a railroad employee is engaged in interstate commerce, so as to fall within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), is whether such employee at the time of his injury was engaged in interstate transportation, or in work so closely related to it as to be practically a part of it.

(For other cases, see Commerce, Dec. Dig § 27[5].)

3. COMMERCE — INTERSTATE COMMERCE — PERSONS ENGAGED IN.

The work of repairing the tracks of an interstate railroad is part of interstate commerce, and a track repairer is within protection of federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) when so engaged.

(For other cases, see Commerce, Dec. Dig. § 27[8].)

4. COMMERCE — INTERSTATE COMMERCE — PERSONS ENGAGED IN.

A track repairer, while engaged in removing worn rails, which had been laid to the side of the tracks of an interstate railroad when the roadbed was repaired, is engaged in "interstate commerce," within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[8].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

Error to Appellate Court, Second District, on Appeal from Circuit Court, Will County; Arthur W. De Selm, Judge.

Action by Matt Kusturin against the Chicago & Alton Railroad Company. Judgment for plaintiff was affirmed on appeal to the Appellate Court (209 Ill. App. 55), and defendant brings error. Affirmed.

O'Donnell, Donovan & Bray, of Joliet (Winston, Strawn & Shaw, of Chicago, of counsel), for plaintiff in error.

Snatt, Heise & Snatt, of Joliet for defendant in error.

STONE, J. This is a writ of error to the Appellate Court for the Second District to review a judgment affirming a judgment of the circuit court of Will county on appeal. The trial court entered judgment in favor of the defendant in error, after requiring a remittitur of $3,321.80 from the amount of $5,821.80.

The declaration consists of two counts. Both counts allege that the plaintiff in error is an interstate carrier, and that the defendant in error was employed by it as a section hand, with other servants, in repairing and maintaining the track and roadway, by removing old and defective

*Decision rendered, Feb. 20, 1919. Rehearing denied, April 2, 1919. 122 N. E. Rep. 512.

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steel rails from the track and roadway and replacing the same with other steel rails. The negligence charged in the first count is that other servants and employees carelessly, negligently, and wrongfully caused or permitted a certain heavy piece of steel, commonly called a rail, to strike and fall upon and against the left foot of the defendant in error with great force and violence. The negligence charged in the second count is that, while plaintiff in error's servants were loading old rails upon a flat car, the foreman or vice principal of plaintiff in error carelessly, negligently, and wrongfully caused, directed or permitted the flat car to be loaded with rails in such a manner that by, through, and in consequence thereof a certain heavy piece of steel, commonly called a rail, fell and struck upon and against the left foot of the defendant in error with great force and violence. The plaintiff in error filed a plea of the general issue, and also a special plea denying that it was engaged in interstate commerce, or that the defendant in error at the time of his injury was engaged in interstate commerce.

The accident happened near Rome on November 3, 1915. At that point there were four tracks—two main tracks and two side tracks, the main tracks being in the center. The railroad runs practically north and south. The two outside tracks are known as passing tracks. The space between the main and passing tracks is about 8½ feet. The south-bound passing track is about 5 inches lower than the south-bound main track. Both tracks are ballasted; the ballast extending about 2 feet beyond the ends of the ties and sloping gradually to the outside of the passing track. During the two weeks preceding the accident the gang in which the defendant in error worked were engaged in taking out the old rails of the main track, replacing them with new steel, resetting the ties, and surfacing the roadbed. During the forenoon of the day of the accident defendant in error was engaged in tamping the ties and loading the old rails onto a flat car. After noon, when he was hurt, he was helping load onto a flat car some of the old rails that lay in the space between the main and passing tracks. This flat car stood on the south-bound passing track. The particular rails that were being loaded had been lying there about two weeks, opposite the places where they had been taken from the track. There is no evidence that they in any way interfered with the operation of the trains, or as to what was to be done with them after they were loaded on the car. As the old rails were loaded this flat car was "pinched" along, so as to be opposite the next rails to be loaded. The floor of the car was about 4 feet above the rails and about 8 feet wide. The rails were what are called 80-pound rails, but at the time of the accident weighed about 75 pounds to the yard. They were 30 feet in length and weighed about 750 pounds each. In loading a rail the men took their positions side by side along the rail, and at the signal "Up," given by one of the foremen, picked up the rail. At the signal "High" they raised the rail above their heads, and at the signal "Over" they pushed or threw the rail onto the car. At the time of the accident these signals were given, and one end of the rail was thrown too soon, causing it to fall. Defendant in error testified that he tried to jump back with the others when warned of the danger by shouts from all of the men, and in doing so caught his heel on a tie which protruded from the ballast, and the rail fell on his instep and crushed it badly.

It is contended by plaintiff in error that the defendant in error at the time of his injury was not employed in interstate commerce, that the plaintiff in error was not negligent, that the defendant in error assumed the risk, that the verdict is the result of passion and prejudice, that the trial court erred in rulings on the evidence and in instructing the jury, and that the release executed by the defendant in error is a bar to any recovery.

The action is brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]). The first count of the declaration is based on the averment that both defend-

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ant in error and plaintiff in error were at the time of the injury engaged in interstate commerce, and that the injury was received through the negligence of fellow servants employed by plaintiff in error. The second count, while charging that both were engaged in interstate commerce, further charges that the injury was received through the negligence of a vice principal of plaintiff in error, to wit, the foreman of the section gang. The record, however, contains no evidence to establish the negligence of the foreman, and the right of recovery of the defendant in error therefore depends in the first instance upon whether or not both employer and employee were engaged in interstate commerce at the time of the injury. It was stipulated that the employer was so engaged, and the first question presented is whether or not the defendant in error was so engaged at the time of the injury. It is urged by plaintiff in error that the work of removing old rails from the right of way was not an act in the work of repairing the road or roadbed used in interstate commerce and that such work was not an act necessarily incident to such repair, and that therefore defendant in error, while so employed, was not engaged in interstate commerce.

[1-4] The law governing the facts of the case considered often presents a close question in this class of cases, and its application to such fact by courts at times seems subtle; but, having in mind that Congress has no power to deal with the question, except under its power to regulate interstate commerce, it will be seen that precision in applying the provisions of the federal Employers' Liability Act is perhaps justifiable. As this is a federal question, the views held by the federal court of last resort are therefore controlling. That court, in the case of New York Central & Hudson River Railroad Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, states the doctrine underlying this class of cases as follows:

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

So in the case of Chicago, Burlington & Quincy Railroad Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the rule is declared to be:

"It is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. * * * The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it"—citing Shanks v. Delaware, Lackawanna & Western Railroad Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

The work covered in repairing the track of an interstate road has been held by the federal court to be a part of interstate commerce. In Pedersen v. Delaware, Lackawanna & Western Railroad Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, the court said:

"Tracks * * * are as indispensable to interstate commerce * * * as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. * * * We are of opinion that the work of keeping such instrumentalities in a proper state of repair * * * is so closely related to such commerce as to be * * * a part thereof."

This being the rule in the federal court, the question then arises: Was the work in which defendant in error was engaged at the time of his injury so directly and immediately connected with the repairing of the track of the plaintiff in error or so closely related thereto as to practically form a part of or a necessary incident thereof?

The facts in the Pedersen Case, supra, differ somewhat from the

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facts in this case, in that in that case the employee was injured while carrying bolts to be used in the work of repairing a bridge which formed part of an interstate road, while in the present case the rails which were being loaded had been taken out of the track, and evidence does not disclose the purpose for which they were being removed from the right of way. The courts of the various states have somewhat differently applied the rules, here referred to, to the facts under consideration in the cases before them. The Court of Appeals of Kentucky, in the case of Illinois Central Railway Co. v. Kelly, 167 Ky. 745, 181 S. W. 375, where a track laborer was injured while loading steel rails onto a flat car, which rails had been removed from the track and lay on the right of way, held that the employee was not at that time employed in interstate commerce, for the reason that the rails along the side of the track could not be regarded as an interference with the road's use of the track or its business as a common carrier and there was nothing to show the intention to use the rails elsewhere. The court there says:

"In view of this situation, we are unable to see how the later work of gathering up these old rails for the purpose of storing them elsewhere, or perhaps, selling them as scrap steel, can in any sense be considered as a repairing of the track, or as necessary to appellant's engaging in interstate commerce."

To the same effect is the case of Cincinnati, New Orleans & Texas Pacific Railway Co. v. Hansford, 173 Ky. 126, 190 S. W. 690, decided by the court under the same rule. The rule was adopted by the Supreme Court of Utah in the case of Perez v. Union Pacific Railway Co., 173 Pac. 236. In that case the employee was one of a certain gang engaged in repairing a track. Some of the men were engaged in taking up old rails and putting in new ones, and while so engaged laid the old rails along the side of the track on the right of way. Plaintiff was a member of the gang engaged in removing these old rails from the point where they had been laid, placing them on a push car and conveying them to a toolhouse. The court held he was not employed, at the time of the injury, in interstate commerce, and held that the crucial test in such case is:

"Was he enaged in the interstate business at the particular time of injury?"

That court also held that the employee was not then so engaged, for the reason that he was not at the time engaged in repairing the track, saying:

"The old rails might have lain on the side of the track for an indefinite * * * time without inconvenience to interstate travel or transportation."

In the case of Hudson & Manhattan Railroad Co. v. Iorio, 239 Fed. 855, 152 C. C. A. 641, decided by the United States Court of Appeals for the Second Circuit, it was held that Iorio, who was a trackman employed by defendant, and at the time of his injury was assisting in putting new rails into a pit near the tracks, where such new rails were stored against the time when they might be required for track repair, was not at the time of his injury engaged in interstate commerce, for the reason that the rails which he was engaged in storing against a use that was certainly not imminent, and might never occur, were not at the moment engaged in or practically part of interstate commerce—

"for that commerce was going on without any present assistance, either from Iorio, or the rails on which he was working, or the men who were working with him. We therefore hold that the actual employment or use at the moment of the injury of the thing upon which the person injured was working is the test of the applicability of the statute, under the circumstances such as shown here. By that test plaintiff below was not practically engaged in or a part of interstate commerce when he was hurt."

On the other hand, the Supreme Court of Minnesota, in the case of

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Cherpeski v. Great Northern Railway Co., 128 Minn. 360, 150 N. W. 1091, held that, where an employee was injured while handling old rails that had been removed from the track and loaded on a pushcar and removed from the place where new ones were being installed, he was engaged in interstate commerce, for the reason that the removal of old rails was a part of the whole task of repairing the road. The court there says:

"The repair of the road was a work of interstate commerce. That it was found convenient to put the old rails on a flat car, in disposing of them, does not make the work any nearer the part of interstate commerce work."

So in the case of Columbia & Puget Sound Railroad Co. v. Sauter, 223 Fed. 604, 139 C. C. A. 150, an employee of a railroad company, who was killed while removing trash and drift so that a trestle could be erected for the passage of trains across a river, and which was later to be used for rebuilding an old bridge, was held to have been engaged in interstate commerce. In the case of Glunt v. Pennsylvania Railroad Co., 249 Pa. 522, 95 Atl. 109, where an employee, while engaged in installing a new signal system, was struck by a passenger train passing on a track other than the one on which he was working, it was held he was engaged in interstate commerce, though signal service was not in operation or use, and that the fact that he had ceased his activities and stepped back from his place of work would not take him out of interstate commerce. In the case of Texas & Pacific Railroad Co. v. White, 177 S. W. 1185, a section foreman was injured while returning to his home on a hand car after having repaired a broken joint in the rail, while helping to lift the car from the track, so that a freight train could pass, and he was held to be engaged in interstate commerce at the time of the accident. The court said:

"The return trip to Lorraine, his headquarters, was as much an incident to and a part of work of repairing the broken rail as was the outgoing trip to perform that service."

It is urged on behalf of the defendant in error that the removal of the old rails in this case was part of the repairing of the track or the replacing of new rails, and that the rule is that, in determining whether or not the employment at the time of the injury was interstate or intrastate in its character, the operation as a whole, as distinguished from momentary employment, is to be considered, drawing the line only where one task is finished and the other is begun, and in support thereof Erie Railroad Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, is cited. In that case deceased was an employee in charge of a switch engine in the defendant's yard at Croxton, N. J., and was engaged in switching freight cars about the yards. Some were interstate and others were intrastate cars. At the close of his day's work he took his engine to the place where it was to remain for the night and started to leave the yard, and while passing over one of the tracks was struck by an engine and received injuries from which he died. He was held to have been engaged in interstate commerce. The court says:

"In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty of his employment. See North Carolina Railroad Co. v. Zachary, 232 U. S. 248 [34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159]. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than the other. His day's work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of his injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for the present purpose of no importance."

It will thus be seen from this late case that the federal court took

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the view that an employee is within the federal Employers' Liability Act if the employment in which he is engaged at the time of his injury is an incident to interstate commerce, even though it might be likewise an incident to intrastate commerce. In the case at bar the scope of the employment of the defendant in error was that of repairing tracks. Such repair work is, as we have seen, so connected with interstate commerce as to be a part thereof. The work of loading these old rails, while not the actual work of bolting in new rails, was yet a part of the cleaning-up process made necessary by putting in new rails. This work could not be said to in any way be an incident to intrastate commerce. This case is therefore to be distinguished from those cases where the employment is changed from work which is a part of interstate commerce to that which is a part of intrastate commerce. There is nothing in the record to show that the employment of the defendant in error was in intrastate commerce, and while under the federal Employers' Liability Act it is incumbent on the employee to show that he was engaged in interstate commerce, regardless of the fact that he may not have been engaged in intrastate commerce, yet such fact is of assistance in determining whether he was, in fact, still engaged in interstate commerce, or had completed such employment and had taken up employment of a different character. In this case the one operation connected with interstate commerce was that of repairing the track, and if the removal of these old rails was a part of such repair work, then the defendant in error was engaged in interstate commerce at the time of his injury. It appears from the evidence that for two weeks they had been taking out these old rails and replacing them with new ones and tamping down the roadbed; that the defendant in error was engaged in tamping the roadbed and loading these rails on the morning of his injury; that after noon his work was confined, up to the time of his injury, to the loading of the old rails.

We are of the opinion that the removal of such old rails was a part of the general work of repairing the track. The fact that if those old rails remained on the right of way they would not interefere with the use of the track in interstate commerce is not controlling in determining the question whether the work of removing them was practically a part of the repairing of the road. As we view the matter, the removal of these old rails was an incident to such repairing and necessary to a proper upkeep of the track. To hold that such work was not a part of the work of repairing the track would be analogous to holding that while the building of a scaffold which surrounds a house under construction is a necessary part of the work of construction, the removal of such scaffold when the house is built is not. A house surrounded by a scaffold could, no doubt, be used without such scaffold being taken down; but no one would contend that it was not properly a part of the work of completing such house to remove the scaffold when its presence was no longer necessary. So, in the repairing of the track, the removal of the old rails is analogous to the removing of the tools used in making such repairs or the removal of the hand car on which the materials were conveyed to the place where the repair work was done. It was within the scope of the work necessary to keep the track and roadbed in that condition which good railroading demands, whether such railroading be interstate or intrastate. Had the injury to defendant in error occurred during a single act of removing an old rail from its place in the roadbed onto the flat car, no one would contend that the placing of that rail on the car was not a part of the act of repairing the road; and we believe that to split the scope of employment in such a case by holding that the work of removing the old rails, though in fact but a continuation of the work of putting new rails into the track, was nevertheless not a part of such repair, would constitute an unwarranted refinement of reasoning, not contemplated by the framers of the act, nor by the Constitution by which said act is limited, and would work an unjustifiable hardship. We are there-

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fore of the opinion that defendant in error at the time of his injury was engaged in interstate commerce and therefore came within the purview of the act.

[5, 6] It is also urged by plaintiff in error that there was no evidence tending to establish negligence on its part. The rule established by the federal courts is that the federal act proceeds on the principle which regards negligence as the basis of the duty to make compensation and excludes the existence of such duty in the absence of such negligence. Erie Railroad Co. v. Winfield, supra. The question of negligence was therefore one of fact, to be left to the jury, under proper instructions from the court, and unless, upon a review of the evidence, this court is able to say that there was no evidence fairly tending to show negligence or that this court will not disturb the verdict. The evidence in the record fairly tends to show that defendant in error's injury was due to negligence on the part of his co-employees in throwing the rail upon the flat car, and the jury were justified in so finding.

[7] It is also contended on the part of the plaintiff in error that defendant in error assumed the risk of injury from fellow servants. Under the federal Employers' Liability Act the fellow servant doctrine is no longer available as a defense, and if his injury was caused by the negligence of other members of the gang in loading rails he did not, under the facts in this case, assume the risk of such negligence. Devine v. Chicago, Rock Island & Pacific Railway Co., 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916B, 481. In the recent case of Boldt v. Pennsylvania Railroad Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385, the United States Supreme Court said:

"In cases within the purview of the statute the carrier is no longer shielded by the fellow servant rule, but must answer for an employee's negligence as well as for that of an officer or agent."

While under the federal act an employee assumes the ordinary risks of his employment, unless there be some violation of a federal law for the safety of employee, the risk arising out of the negligence of a fellow servant was not assumed by virtue of that act under the facts in this case. Boldt v. Pennsylvania Railroad Co., supra.

[8, 9] It is also urged that defendant in error executed a release which is a bar to any further recovery. If defendant in error executed such release with knowledge of its meaning, such release will bar his recovery in an action at law. Hartley v. Chicago & Alton Railroad Co., 214 Ill. 78, 73 N. E. 398; Momence Stone Co. v. Turrell, 205 Ill. 515, 68 N. E. 1078. The evidence shows that defendant in error was Croatian by birth; that he spoke and understood the English language very imperfectly, and could not read or write it; that when he had been in the hospital about 14 weeks the claim agent of the plaintiff in error who spoke English only, visited him in company with an interpreter employed by said claim agent, who spoke the Austrian language, of which the Croatian language was a dialect, or to which it was very similar. The plaintiff in error's claim agent secured the signature to an instrument releasing plaintiff in error from all liability both under the Workmen's Compensation Act (Laws 1913, p. 335) and the federal Employers' Liability Act for the sum of $70. The release and receipt for the said sum were in the English language. Defendant in error testified that he could not read the release, that they told him this was a payment of half wages under the Compensation Law, that he worked under the Compensation Law elsewhere, and that he did not know that he was releasing his cause of action. The interpreter also testified that he told defendant in error that this paper was payment to him under the Compensation Act, and that it was offered as such payment for the 14 weeks since the injury. Whether or not defendant in error, who could not talk nor read English, signed this release with a knowledge of its meaning, was a question for the jury,

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and we cannot say that they were not justified in finding that he did not have such knowledge.

Objection is raised to certain instructions. We have, however, examined those instructions, together with the entire series, and find no reversible error.

There being no reversible error, the judgment of the Appellant Court will be affirmed.

Judgment affirmed.

APPELLATE COURT OF INDIANA.

DIVISION No. 2.

GENERAL AMERICAN TANK CAR CORPORATION

v.

BORCHARDT. (No. 10441.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEATH NOT DUE TO "WILLFUL MISCONDUCT."

Death of painter while painting inside of tank car without using respirator because the one furnished was defective *held* not due to his "willful misconduct" in failing and refusing to use safety appliance so as to render improper award to his dependent mother under Workmen's Compensation Act; such misconduct meaning a deliberate purpose not to discharge some duty necessary to safety.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION—AMOUNT OF AWARD—PARTIAL DEPENDENCY.

Under Workmen's Compensation Act, § 37, partially dependent mother of deceased painter, whose average weekly wage amounted to $24, of which he gave her $15, or five-eighths of the maximum weekly wage for the purpose of computing compensation as fixed by section 40, *held* entitled to an award of $8.25 a week for 300 weeks, with burial expenses.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act for compensation for death of Edward Borchardt, the employee, by Bertha Borchardt, opposed by the General American Tank Car Corporation, the employer. Compensation was awarded by the Industrial Board, and the employer appeals. Affirmed.

W. J. Whinery, of Hammond, for appellant.

McAleer, Dorsey & Gillett, of Hammond, for appellee.

MCMAHON, J. The appellee filed her petition before the Industrial Board and alleged that her son, Edward Borchardt, died on the 13th day

*Decision rendered, March 13, 1919. 122 N. E. Rep. 433.

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of February, 1918, as the proximate result of a personal injury received by him by reason of an accident arising out of and in the course of his employment by the appellant at its plant in East Chicago, Ind., and that said Edward left surviving him as his only dependents the appellee, his mother, Edna Borchardt, his sister, aged 18 years, and William Borchardt, a brother, aged 16 years.

The appellant filed answer in two paragraphs. The first was a general denial; while the second alleged that the death of said Edward Borchardt was due to his willful misconduct in failing and refusing to use a safety appliance provided for him to use in the performance of his duties.

A hearing was had before one member of the board, who made an award of $13.20 per week for 300 weeks and $100 for burial expenses and costs. Upon a review before the full board, the award was reduced to $8.25 per week and $100 for burial expenses, and costs.

This award was made by two members only. The third member joined in the findings of facts, but not in the award.

The facts as found by the full board are: That on or prior to February 13, 1918, Edward Borchardt was in the employ of appellant as a painter at an average weekly wage in excess of $24; that said Edward Borchardt was employed by the defendant to paint the inside of steel tank cars; that the defendant had employed for such service as many as six other different painters; that the said tank cars had an opening on the top or dome approximately 15 inches in diameter, and an opening, or outlet, on the bottom; that these two openings are the only ones in steel tank cars of the design and character upon which said Edward Borchardt was employed as a painter; that in the painting of said cars the defendant always required two painters to be engaged upon the same car, one to work on the inside, the other to remain on the top of the dome so as to assist the inside painter to withdraw therefrom when safety required; that, because of poisonous fumes given off by the paint used in painting the inside of said steel tank cars, the defendant had adopted a rule that the inside painter should always use a respirator, or a device intended to furnish the painter with outside air; that such respirator was so constructed that the painter held in his mouth a device through which he breathes the air, but his nostrils were closed by means of nose pinchers and a hose protruded through the dome into the outside air, and by this means the painter was furnished pure air from the outside; that even by the use of such respirator a painter could not safely remain inside the tank and at his work for more than eight minutes at a time; that, notwithstanding the rule of the defendant, its painters, prior to the 13th day of February, 1918, had frequently painted the inside of its tank cars without the use of a respirator; that the evidence does not show that the defendant ever had knowledge of such practice on the part of its painters, excepting one occasion when a foreman discovered one of the painters painting on the inside of a tank car without the use of a respirator; that at said time the foreman at once directed the painter to withdraw from the car, severely reprimanded him, and advised him that if he were again apprehended in the act of violating said rule he would be discharged; that the defendant had procured and was using for the first time on the 12th and 13th of February, 1918, a new paint, or a paint of a new composition, for the paintig of the inside of tank cars; that the evidence does not show that said paint was more poisonous than that previously used, and does not show that the defendant's foreman advised its painters that it was any more poisonous; that on the evening of February 12, 1918, defendant's foreman requested said Edward Borchardt and a coemployee to return for work on that night and to dry out three tank cars, and, if they had sufficient time, to paint them on the inside; that at said time the foreman instructed the said Edward Borchardt that he was not to enter said car without a respirator, and at that time furnished

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him with a new respirator which had been used for the first time on said date, and showed him how to use it; that, pursuant to the request of the foreman, the said Edward Borchardt and his co-employee returned for work on said evening, dried out the three tank cars, and then proceeded to the painting; that the said Edward Borchardt first went into the car with a respirator and remained in a few minutes and came out, reporting to his coemployee that the respirator did not work properly; that a small disk or cap had been lost off the respirator, which allowed said Edward Borchardt to breathe the fumes from the paint; that the coemployee then went into the tank and worked from five to eight minutes without the respirator and came out; that the said Edward Borchardt then went into the tank without the respirator, and while in the tank painting without the respirator was overcome by the poisonous fumes and died in the tank; that on the night when he was injured Edward and his coemployee were working alone, and that no foreman or superintendent was present to advise them or direct their work; that the defendant had actual knowledge of the death of said Edward Borchardt immediately after it occurred; that appellee is a widow and mother of said Edward, and owns no property; that she has two other children living with her, Edna, aged 18 years, and William, aged 16 years, both of whom were working and contributing to the support of the family; that at the time of his death said Edward Borchardt was 20 years old and was living with his mother, to whom he was contributing $15 a week.

The errors assigned are that the award of the full board is contrary to law, is not sustained by sufficient evidence, and is contrary to the evidence.

The appellant contends that the decedent met his death by reason of his willful misconduct, in that he willfully failed and refused to use a safety appliance provided for him to use in the performance of his duties, and that it was error to award any compensation under section 8 of the Workmen's Compensation Act (Acts 1915, p. 392), which provides that:

"No compensation shall be allowed for an injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, and willful failure or refusal to use a safety appliance. * * * The burden of proof shall be on the defendant employer."

In order to defeat appellee's claim for compensation, the burden is on appellant to establish affirmatively that it furnished a proper safety appliance, and that the decedent's failure to use such safety appliance amounted to willfulness within the meaning of said section 8.

Can this court, from the facts found by the Industrial Board, or from the evidence, say, as a matter of law, that the death of the decedent was brought about by reason of his willful misconduct?

This court, in Haskell & Barker Car Co. v. Kay, 119 N. E. 811, said:

"A mere failure to use the proper safety appliance, however, will not defeat a claim for compensation. To have such an effect the failure must amount to willfulness, or to a refusal within the meaning of this statute. Whether the conduct of a workman in any circumstance amounts to a willful failure or to a refusal is a mixed question of law and fact. It involves: First, the determining of the facts from the evidence, including legitimate inferences, which usually is the exclusive province of the board; and, second, the application of the law as represented by the statute above quoted to such facts. In this latter field the action of the board is reviewable by this court on appeal. Inland Steel Co. v. Lambert, 119 N. E. 162. Since the board by its award has determined the issue of willfulness in favor of appellee, this court, in reviewing the action of the board, must consider only the evidence that tends to support the award, and with such evidence only those permissible inferences in harmony therewith. * * * A mere failure to do a certain thing does not involve action or omission more serious in nature than negligence.

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To defeat appellee's claim it must appear that such failure was willful, or that there was a refusal. In our judgment the word 'or' is used in the statute in an appositive sense, or merely as an alternative expression of the same idea, that it introduces the word 'refusal' merely in explanation of the phrase 'willful failure,' and that the two expressions are practically exquivalent in meaning."

In Indianapolis Light & Heat Co. v. Fitzwater, 121 N. E. 126, this court said:

"'Willful misconduct' means something different from and more than negligence, however great; it involves conduct of a quasi criminal nature; the intentional doing of something, either with the knowledge that it is likely to result in a serious injury, or with a wanton and reckless disregard of its probable consequences."

The Supreme Court in construing the words "willful failure" as used in the coal mining statute, said:

"A willful failure implies more than mere nonconformity, inattention, thoughtlessness, or heedlessness, and goes to the intent implied in failing to do the thing, * * * and implies the intentional and conscious violation and presistent refusal or neglect, not necessarily with evil or malicious intent; it amounts to more than mere passive negligence; it is active refusal, it is willful or reckless disregard, * * * and an intentional failure and refusal to perform a plain statutory duty." Princeton Coal Co. v. Lawrence, 176 Ind. 469, 95 N. E. 423.

"Willful misconduct" means a deliberate purpose not to discharge some duty necessary to safety. It implies obstinacy, stubbornness, design, set purpose, and conduct quasi criminal in nature. Louisville, etc., Co. v. Bryan, 107 Ind. 51, 7 N. E. 807; Brooks v. Pittsburgh, etc., Co., 158 Ind. 62, 62 N. E. 694; Southern, etc., Co. v. McNeeley, 44 Ind. App. 126, 88 N. E. 710, 714; Great Western, etc., Co. v. Pillsbury, 170 Cal, 180, 149 Pac. 35.

[1] Are the facts, as found by the board, and hereinbefore set out, when considered as an entirety, with all the irresistible inferences that may result therefrom, such that we can say, as a matter of law, that the death of Edward Borchardt was brought about by reason of his willful misconduct? Do these facts imply anything more than mere nonconformity, inattention, thoughtlessness, or heedlessness in failing to use the respirator? Do they show an active refusal, a willful or reckless disregard, and intentional failure or refusal to perform a duty, so as to come within the definition of willful misconduct as given in the authorities heretofore cited?

It is clear to us that all these questions must be answered in the negative. The award is supported by the finding of the board, and also by the evidence, and is therefore not contrary to law.

A great many witnesses testified, but it is not necessary for us to set out the evidence in detail. It will be sufficient to review the evidence of but two of them.

Appellant's foreman, when asked what he said to decedent, testified that he asked decedent and another employee to come back at night and paint the inside of some tank cars; that they came back; that he got the decedent the respirator and showed it to him, and that the decedent tried it; that he told them one of them should use the machine and one stay on top; that he was going home, and they would have to look after themselves and take care of themselves; that he told the decedent they were not supposed to go in without the respirator; one man work with it and the other to stay on top and watch; that no instruction or permission was given them to work in car without respirator; gave instruction to Edward Boachardt. "He worked for me quite a period; he he obeyed orders and followed instructions pretty well."

The employee who was working with Edward Borchardt at the time of the accident said: That he did not know what instructions were

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given; only had one respirator there at the time; company had had more, but they were all burned up in a fire, and the one they were using the night of the accident was a new one. Edward Borchardt went inside of this tank car first, and remained in eight or ten minutes. He had a protector on. He went back a second time, and came back and said the respirator would not work. Witness then went down without the respirator and stayed four or five minutes, and then came out. Edward Borchardt then went down and stayed eight or ten minutes and did not come out. That is when the accident happened. "Edward did not make any expression that he would not use the respirator that night. The only thing he said to me was it would not work."

There is no evidence that the deceased ever refused to obey orders or to follow instructions. The fair and reasonable inference to be drawn from the finding of the board, as well as from the evidence, is that, if the respirator had not become out of order, he would have used it. He put it on and tried to use it, but for some unkown cause it was out of order and would not work. His failure to use the respirator was not because of willfulness on his part, but because of the fact that it was out of order.

[2] Appellant contends that the amount of the award is incorrect, and therefore contrary to law. The board finds that the deceased was employed at a weekly wage in excess of $24; that he and his brother and sister were each working and contributing to the support of the appellee, who was their widowed mother and who owned no property; that the decedent at the time of his death was living at home with his mother and contributing $15 a week to the appellee. The evidence disclosed that at the time of his death he was receiving about $5 a day. The board made the award on the theory that the average weekly wage of an employee, according to section 40 of the Compensation Act, cannot, for the purpose of computing compensation, be considered to be more than $24.

By section 37 of the Workmen's Compensation Act it is provided that—

"If the employee leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to those dependents shall, in addition to burial expenses, not to exceed one hundred dollars, be in the same proportion to the weekly compensation for persons wholly dependent as the amount contributed by the deceased employee to such partial dependent bears to his annual earnings at the time of the injury."

The weekly compensation for persons wholly dependent, when the average weekly wage amounts to $24 per week or more, is $13.20. Appellee was a partial dependent, and was receiving $15 a week from the deceased, which is five-eights of the maximum weekly wage of $24, as fixed by said section 40. Under this section the anuual earnings of the deceased was $1,248, instead of $1,560, as claimed by appellant. The amount of the award as fixed by the board is supported by the evidence and is according to law.

The award of the Industrial Board is affirmed, with 5 per cent. ncrease, as provided by section 3, Acts 1917, p. 154.

Affirmed.

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SUPREME COURT OF IOWA.

HERBIG

v.

WALTON AUTO CO. ET AL. (No. 32927.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD—REVIEW—TIME OF REQUESTING—"DATE OF AWARD."

Whether or not Acts 37th Gen. Assem. c. 270, § 17, providing that the aggrieved party may apply to the Industrial Commissioner for review of an award in five days after its date, repealed the provision of Code Supp. 1913, § 2477m29, requiring review to be filed within five days of the decision. it superseded it as to fixing time to bring review, and the "date of the award" means the date of its filing with the commissioner.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

(For other definitions, see Words and Phrases, First and Second Series, Date.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—INDUSTRIAL COMMISSIONER — REVIEW OF PROCEEDINGS.

The district court may confirm or set aside the order of the Industrial Commissioner if he finds the commissioner has committed error in one or more of the particulars designated by Acts 37th Gen. Assem. c. 270.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Appeal from District Court, Mahaska County; Henry Silwold, Judge.

Appeal from an order of the court below reversing the finding of the Industrial Commissioner reviewing a decision and award of arbitrators. Reversed.

McNett & McNett, of Ottumwa, for appellants.

McCoy & McCoy and Burrell & Devitt, all of Oskaloosa, for appellee.

STEVENS, J. Charles Herbig, husband of Susan Herbig, claimant and appellee herein, while engaged in removing some rubbish from an upper story of a building formerly occupied by appellant as a garage, fell therefrom, receving fatal injuries. The accident occurred on the 17th of November, 1917, and on December 12th following appellee filed her claim for compensation and for arbitration thereof. A hearing was had at Ottumwa before the arbitrators appointed by the commissioner, resulting in an award by a majority thereof allowing appellee $6 per week for 300 weeks. The award was dated and signed March 6th, and filed with the Industrial Commissioner on March 8, 1918. Appellant's claim for review was filed March 12th, and notice thereof served upon appellee the following day. The Industrial Commissioner reversed the finding and award of the arbitrators upon the ground that deceased's employment by appellant was casual only. Appellee filed written objections with the Industrial Commissioner challenging his jurisdiction to review the award. The ground of appellee's objection to the jurisdiction of the commis-

*Decision rendered, March 18, 1919. 171 N. W. Rep. 154.

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sioner was that no claim for review was filed within the time required by statute. Claimant appealed to the district court from the adverse finding and order of the commissioner. The court held that the Industrial Commissioner did not have jurisdiction to review the award for the reason that appellant's application therefor was not filed with the commissioner within five days after the date of the award.

[1] The sections of the statute material to a decision of the questions involved upon this appeal are as follows:

Section 2477m29, 1913 Supplement to the Code:

"The committee on arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be in the city, town or place where the injury occurred and the decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the Industrial Commissioner. Unless a claim for a review is filed by either party within five days, the decision shall be enforceable under the provisions of this act."

Section 17, c. 270, Acts 37th G. A.:

"* * * Any party in interest may present a certified copy of an order or decision of the commissioner, or an award of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree, in the absence of an appeal from the decision of the Industrial Commissioner, shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. Upon the presentation to the court of a certified copy of a decision of the Industrial Commissioner, ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify the decree to conform to such decision.

"No order or award of an arbitration committee is appealable direct to the courts, but if any party in interest is aggrieved thereby, he may within five (5) days from the date thereof apply to the industrial commissioner for a review of the same by such industrial commissioner in the manner as hereinbefore provided. * * *

As will be observed, the statute requires that the findings of fact, rulings of law, and other matters pertaining to questions arising before the arbitrators shall be filed with the Industrial Commissioner. Prior to the enactment of section 17, c. 270, Acts of the Thirty-Seventh General Assembly, the Industrial Commissioner held that claims for review must be filed by the aggrieved party within five days after the finding of the arbitrators was filed in his office at Des Moines.

It is the contention of counsel for appellant that section 2477m29 is still in force, notwithstanding chapter 270, supra, which provides that application for review of the findings of the arbitrators must be filed with the commissioner within five days after the findings and award of the arbitrators. It is the claim of counsel for appellee that the provision of section 17, c. 270, supra, is inconsistent with the provisions of section 2477m29, and the same was repealed thereby. Whether the later enactment repealed other provisions of the former or not, it superseded it in so far as it fixes a definite time within which claims for review may be filed with the commissioner, which must be within five days after the date of the award.

The question is: What is meant by the "date of the award"? Is the award complete when the finding and conclusion of the arbitrators is dated and signed, or is it completed by filing same with the Industrial

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Commissioner? When does it become "the award"? No appeal can be taken from the award of the arbitrators to the district court, and if no claim is filed for review within the time allowed by the statute, any party in interest may present a certified copy thereof to the district court of the county in which the injury occurred, and have a decree rendered therein in accordance therewith. While the statute does not specifically provide that the commissioner shall certify to the copy of the award of the arbitrators for this purpose, such is the necessary inference from the statutory requirement that same be filed with him. He thereby becomes the custodian thereof. While the instrument signed by the arbitrators necessarily includes the finding, order, and award thereof, it does not become effectual as such until filed with the commissioner. The statute makes no provision for notice to the parties of the award, nor for publicity thereof, until the same is filed with the commissioner. The duty of the arbitrators after completing their investigation, and signing their award, is to cause the same to be filed with the commissioner. We think the Legislature obviously contemplated that "the award" should date from the time of its filing with the commissioner, and that the aggrieved party may have five days thereafter to apply to the commissioner for a review thereof. The statute requires that the hearing before the arbitrators be in the city, town, or place where the injury occurred. This may, of course, be in a part of the state remote from the office of the commissioner, and the time intervening between the signing and dating of the findings of the arbitrators and publicity thereof by filing with the commissioner may reduce the time allowed upon appellee's theory in which to apply to the commissioner for review to much less than five days. This could hardly have been contemplated by the Legislature. Thus construed, appellant's application was filed with the commissioner within the time required.

[2, 3] II. The court below did not review the findings of the commissioner upon the merits, but based its decision solely upon the ground that the commissioner was without jurisdiction to review the award of the arbitrators. We have, therefore, no question before us involving the merits. The district court may confirm or set aside the order of the Industrial Commissioner if he finds that he has committed error in one or more of the particulars designated by chapter 270, Acts of the Thirty-Seventh General Assembly. This court is limited in its review upon appeal to questions decided by the lower court.

Having held that the court erred in its finding that the commissioner was without jurisdiction to review the award of the arbitrators, it follows that its judgment and decree must be reversed.

Ladd, C. J., and Evans and Gaynor, JJ., concur.

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SUPREME COURT OF KANSAS.

RICKEL

v.

ATCHISON, T. & S. F. RY. C. (No. 22006.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ELECTION NOT TO ACCEPT THE ACT—PRESUMPTION AND BURDEN OF PROOF.

When an officer of a corporation presents to the secretary of state a document in writing in which it is recited that such corporation elects not to come under the provisions of the Workmen's Compensation Act, and the secretary of state accepts and files such document as a genuine and authorized instrument, the public has a right to act upon the presumption that the execution and presentation of the document were authorized by the corporation, and, if not so authorized, the burden is on the corporation to prove that fact.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—TRIAL—PROVINCE OF JURY—NEGLIGENCE.

A jury may draw upon their own information, without proof, touching simple matters of common knowledge and experience, and they do not need to be told that the use of a jack (or other equally efficient device) is necessary to raise the wheels of a heavily loaded vehicle from a groove or rut into which the wheels had slipped; and, when all the facts touching such a situation are in evidence, the jury may properly find that the attempt to drag the loaded vehicle out of the groove without the use of jacks was an act of negligence and a finding that such negligence caused the injury and death of a workman will not be disturbed.

(For other cases, see Master and Servant, Dec. Dig. § 278[17], 286 [27]; Trial, Dec. Dig. § 311.)

Appeal from District Court, Wyandotte County.

Action by William C. Rickel, administrator of Antonio Fuentez, deceased, against the Atchison Topeka, & Santa Fe Railway Company. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, J. W. Orr, of Atchison, and C. Angevine, of Kansas City, for appellant.

William C. Rickel, J. O. Emerson, and David J. Smith, all of Kansas City, for appellee.

DAWSON, J. This is an action for damages for injuries which caused the death of Antonio Fuentez, a Mexican workman, while he was employed in the defendant's workshop.

While the deceased and three other workmen were engaged in moving a heavy boiler on a wheeled "trailer" which was hauled by a small motortruck, one or more of the wheels of the trailer dropped into a groove and stopped. The floor where the men were at work contained a railway track which had been planked, and this groove was beside

*Decision rendered, March 8, 1919. 179 Pac. Rep. 550. Syllabus by the Court.

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the rail to permit the revolution of the flanges on car wheels. Antonio placed a piece of wood in front of the trailer wheel so that it might be hauled up out of the groove. The foreman who was operating the motor-truck called on Antonio to steady the boiler, and then started his motor; but, instead of raising the trailer wheel out of the groove, the trailer was swung around, and the boiler and trailer were capsized, and Antonio was fatally crushed between the falling boiler and a neighboring telegraph pole.

Plaintiff's petition alleged that the defendant had filed with the secretary of state a written election not to come under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216, and Laws 1917, c. 226): The petition charged negligence in various ways: (1) In permitting a groove in the floor which rendered dangerous the operation of the trailer thereon; (2) in attempting to raise the loaded trailer without the use of levers or jacks; (3) in providing an insufficient number of workmen for the task, thus increasing the danger; (4) in attempting to move the boiler with a truck and trailer so light and small in comparison with the size of the boiler as to render the work unnecessarily dangerous; and (5) in not warning the deceased of the danger of the boiler rolling on him. Deceased was a mere helper and inexperienced and did not know or appreciate his danger and had no control of the operation or of the method of performing the work.

Defendant's answer was a general denial, and that the death of the workman was occasioned by his own negligence; that his fatal injuries were the result of risks involved in the employment, and that these had been assumed by the deceased.

The jury returned a general verdict for plaintiff, and answered certain special questions:

"(7) Was the crack or opening in the platform or floor, into which the wheels of the truck dropped, an opening that was left along the side of the rail of the railroad track for the flanges of the car wheels? Answer: Yes. * * *

"(9) If you find that the defendant was guilty of any negligence which caused or directly contributed to the death of Antonio Fuentez, then state fully of what that negligence consisted. Answer: In causing or permitting an opening in its platform; in attempting to raise the wheels of trailer out of crack without the use of jacks; in not providing a sufficient number of competent workmen; in attempting to move the boiler without the proper means of conveyance; in not warning deceased of the danger of standing close to boiler. * * *

"(13) Was the position taken by Antonio Fuentez beside the car obviously dangerous? Answer: No."

The defendant assigns error in the admission of evidence, and in the instructions, and insists that there was no evidence to prove negligence on the part of defendant.

To prove that defendant had elected not to come under the Workmen's Compensation Act, the plaintiff introduced two documents certified by the secretary of state as part of his office files, one of which recited that the Atchison, Topeka & Santa Fe Railway Company, etc., "hereby elects not to accept any of the provisions of House Bill No. 858" (the compensation act of 1911 as amended in 1913) etc. [Signed] "The Atchison, Topeka & Santa Fe Railway Company, E. L. Copeland, Secretary and Treasurer."

[1] The second was to the same effect, but of a date subsequent to the amendments of 1917 to the compensation act, and signed in the same manner. Defendant contends that these documents were insufficient to prove that the railway corporation had elected not to come under the provisions of the act, since a corporation's secretary and treasurer is not an officer clothed with such managerial and executive powers as to au-

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thorize him to speak for the corporation on a subject unrelated to his ordinary duties.

This contention is not incorrect as a principle of abstract law, but here the defendant had permitted this officer to make and file with the secretary of state these documents of election, one in 1913 and the other in 1917. That the documents were genuine, and that they were sufficient in form and text to serve the purpose of those who might need to examine and act upon them, was determined by the secretary of state when he accepted them from the corporation's officer and filed them in his office. Moreover, the election was pleaded in plaintiff's petition, and defendant's unverified general denial would not fairly raise the question of the secretary-treasurer's want of power. If plaintiff's pleading on this matter, based as it was in reliance upon what the files of the secretary of state disclosed, did not correctly state defendant's attitude under the compensation act, the true state of facts was peculiarly within the knowledge of the defendant and not readily accessible to plaintiff, and it was the duty of the defendant to plead the facts. Moreover, defendant's answer contained allegations of assumption of risk, etc., which would be altogether out of place if defendant was operating under the compensation act. Under all these considerations, the court holds that no error occurred in admitting this evidence. 3 Wigmore on Evidence, §§ 2158, 2159.

Error is also urged against one of the court's instructions. Because defendant by objecting to the competency of the evidence discussed above, had raised a question whether the railway company was conducting its workshop within or without the regulations of the compensation act, the instructions were cluttered with a dissertation of law touching the company's liability if it were inside the act and the extent of its liability if it were not within the act, and other related and pertinent matters had likewise to be covered by the instructions. The particular criticism to which defendant directs attention is part of a statement in a complicated instruction which seems to read that assumption of risk was not a defense to an employer who was not within the act. But this same instruction cures this defect, if it is a defect, where it continues:

"However, * * * [if] * * * it elected not to accept the terms of the workmen's compensation statute, this defense will be valid if it is proven by a preponderance of the evidence that the injury and death of the deceased resulted from the usual and ordinary risks of his employment; and, under such circumstances, it must be held that the deceased assumed all the usual and ordinary risks of his employment and also assumed all the risks of his employment of which he had knowledge and the danger of which he appreciated. He also assumed the risk of all dangers the existence of which and the danger from which he knew and appreciated or which he could have known and appreciated by the exercise of ordinary care and prudence on his part."

In view of this latter part of the critized instruction, as well as the jury's thirteenth finding which shows that the sort of ordinary risk which a workman assumes was not in the case at all, the error complained of was not prejudicial.

Defendant's most serious contention is that there was no evidence to support the verdict nor to support the material findings of the jury. It is perhaps true that, since a groove beside the rail was necessary for the flanges of the car wheels (finding 7), the first element of negligence specified by the jury—permitting an opening in the platform (finding 9)—was not negligence at all. Passing for the present the matter of attempting to raise the loaded trailer without levers or jacks, it may also be conceded that there is no evidence that a greater number of workmen would have lessened the probability of the accident or prevented it. Neither can it be said that the truck and trailer were not proper means for moving the boiler. Evidence to support that element of negligence

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is wanting. Nor is there evidence that there was any negligence in failing to warn the deceased.

[2] We come then to the remaining ground of negligence—the attempt to raise the wheels and drag the trailer out of the crack (groove) without the use of jacks. This was a ground of negligence charged in the petition, and, of course, this was the real cause of the accident. There was no formal evidence that jacks ought to have been used, or that the proper and workmanlike way to have raised the loaded trailer was by using jacks. How then did the jury come to find that the failure to use jacks was negligence? Simply because they drew on their own knowledge of a common workaday fact which every intelligent man of common education and experience does know. This boiler weighed 3,500 pounds. It was loaded on a trailer one or more of whose wheels had slipped into the groove by the side of a steel rail. Would it have served any purpose—would it have conveyed any information to the jury that they did not know—to have gone through the formality of calling a workman to testify that the proper way to raise that loaded trailer was by the use of jacks? This court thinks not. Matters of fact of so simple a character are within the common knowledge of jurymen of average intelligence, and the use of a jack to raise the wheel of a heavily loaded vehicle out of a rut or groove is so obviously the proper way to raise it, and so commonly the way it is done, that the jury did not need to be told of it to justify its finding to that effect. There is a clearly defined, though narrow, field of elementary facts of mechanics so notoriously known to every intelligent person that no evidence to establish them before a jury is necessary. Insurance Office v. Woolen-Mill Co., 72 Kan. 41, 46, 82 Pac. 513; Cheek v. Railway Co., 89 Kan. 247, 131 Pac. 617; Cardwell v. Railroad Co., 90 Kan. 707, 136 Pac. 244; 16 Cyc. 852; 15 R. C. L. 1056, 1104; 4 Wigmore on Evidence, § 2570. See, also, notes in 31 L. R. A. 489; 37 L. R. A. (N. S.) 790.

It has been held that a trial court and jury know, without the introduction of evidence, the purpose of a fender on a street car (Spiking v. Railway & Power Co., 33 Utah, 313, 93 Pac. 838); they likewise know the character, construction, and use of an ice cream freezer (Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200); they also know that the use of dynamite in blasting under a city is inherently dangerous (City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221); that vacant buildings are ordinarily more exposed to damage by fire than occupied buildings (White v. Insurance Co., 83 Me. 279, 22 Atl. 167); that it is a matter of common knowledge and needs no proof that the breaking of bridles, harness, and vehicles is of common occurrence, and that when such a mishap transpires it may frighten a gentle horse and cause it to run away (City of Joliet v. Shufeldt, 144 Ill. 403, 413, 32 N. E. 969, 18 L. R. A. 750, 36 Am. St. Rep. 453.)

See, also, the opinion of Judge Van Devanter and the wealth of pertinent citations collected by him in Chicago, M. & St. P. Ry. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962.

[3] The necessity for using jacks to raise the trailer was clearly disclosed by the evidence narrating how Fuentez met his death. A fellow workman and eyewitness testified:

"The trailer was connected with the truck by two cross-chains. Mr. Rogers had charge of the truck. The man that was killed was Mr. Rogers' helper. The loading took place inside the boiler shop. * * * When they started out from the boiler shop, Fuentez was riding here, and Mr. Rogers was driving right on the front. * * * When we got outside against that telegraph pole, the trailer seemed to wabble a little bit, and the front wheel went down, dropped into the groove between the switch [rail] and the planking, and I hollered, 'Whoa!' After that front wheel fell into the groove, Mr. Rogers backed up just a little, and then stepped from the motortruck and beckoned to the Mexican, and pointed

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to two pieces of board that were lying there on the platform and told the Mexican to put them under the wheel, and when the Mexican went down and put these two boards to the wheel, when he got them there, he stood up, and then Mr. Rogers said, 'Watch the board, steady the boiler,' and he went back to the trailer and started off. They put the boards right to that front wheel that was in the groove. After they were put there, Mr. Fuentez stood right in a line with the telegraph pole. When Mr. Fuentez went to steady the boiler, Rogers said, 'Watch them boards.' At that time he was right in between the boiler and the post. When Mr. Rogers backed out a litle bit, these two chains were slacked. When Mr. Rogers told him to steady the boiler and watch the board, the Mexican had his back to this post facing the boiler. He was steadying the boiler. When Mr. Rogers went back and got on the truck and started out, Fuentez was right in the same place; he never moved. When Rogers started up with the truck expecting to pull it on those two boards that had been put in there, it gave a little jerk, and as it gave a jerk this end, in swinging right around, as it swung around it pulled right around with this chain tight in here, and the boiler and trailer all tumbled over. I mean the rear end of the trailer swung around, and, when it swung around, the rear right-hand wheel of the trailer went into this groove, and then the boiler and the trailer all tumbled over at once, just as quick as that (indicating). Fuentez didn't have any chance to get away, because it was done as quick as that."

This evidence makes it so clear and plain that the attempt to drag the heavily loaded trailer out of the groove without the use of a simple device like a jack (or some equally effective mechanical device) was negligence. It is so plain that the jury needed not to be told of it, but might draw on their general information to that extent, and manifestly this negligence brought about the death of this workman, and he himself, obedient and unskilled as he was proved to be, was without fault.

The judgment is affirmed.

Burch, Mason, Porter, and Marshall, JJ., concurring.

JOHNSON, C. J., and WEST, J., concur in the judgment, but are of opinion that the record contains some evidence to sustain the finding of the jury that the defendant had not provided a sufficient number of workmen to watch the board and steady the boiler, and that there was negligence in failing to warn the deceased of his danger.

SUPREME COURT OF KANSAS.

THOMAS

v.

PROCTOR & GAMBLE MFG. CO. (No. 21995.)*

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION LAW—"COURSE OF EMPLOYMENT."

In an action under Workmen's Compensation Law there was evidence that the plaintiff, a 17 year old girl, who was paid by the hour, was injured during a half-hour intermission at noon while, although at liberty

* Decision rendered, March 8, 1919. 179 Pac. Rep. 372. Syllabus by the Court.

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to leave the premises, she remained there and, after eating her lunch, engaged with fellow employees, in accordance with a custom known to and approved by her employer, in riding on a truck, her injury being caused by falling from a truck while it was being drawn by a fellow employee. *Held*, that a finding was justified that the accident occurred in the course of her employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—"ARISING OUT OF EMPLOYMENT."

It is further *held* that the evidence stated was sufficient to support a finding that the plaintiff's injury arose out of her employment.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(Additional Syllabus by Editorial Staff.)

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT—"ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

An injury directly and naturally resulting in a risk reasonably incident to the employment in which the employee was engaged is an injury "arising out of and in the course of the employment."

(For other cases, see Master and Servant, Dec. Dig. § 372.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from District Court, Wyandotte County.

Action by Daisy Thomas, a minor, by her next friend and mother, Anna Thomas, against the Proctor & Gamble Manufacturing Company, for compensation under the Workmen's Compensation Law. Judgment for plaintiff, and defendant appeals. Affirmed.

J. K. Cubbison, of Kansas City, Mo., for appellant.
Stanley & Stanley, of Kansas City, Kan., for appellee.

MASON, J. Daisy Thomas, an employee of the Proctor & Gamble Manufacturing Company, about 17 years of age, recovered a judgment against her employer under the Workmen's Compensation Law (Gen. St. 1915, § 5896 et seq.), and the defendant appeals.

The principal question involved is whether the plaintiff's injury was one arising out of and in the course of her employment. A suggestion is made that it did not result from accident, but the occurrence relied upon seems clearly to fall within the definition of that term. The evidence in behalf of the plaintiff tended to show these facts: She had been working for the defendant a little over five months. Her hours were from 7 to 12 and from 12:30 to 5:30, except on Saturdays, when she did not work in the afternoon. She was paid by the hour. Her custom was to take her lunch with her and eat during the interval between noon and 12:30, which was allowed for that purpose, in the room where she worked, with the other girls in her department, seven or eight in number. The eating of lunch generally occupied about 15 minutes. In the remaining 15 minutes the girls, including the plaintiff, were in the habit of amusing themselves by riding on a small truck used in their department to pull boxes on. The girls had asked the foreman of this department if they could do this, and he had told them they could, but to be careful, and that he did not want any men up there. He knew of the practice and did not object to it; nor did any other representative of the company. During the noon

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half hour the girls were at liberty to go where they pleased. They hardly ever went down to the restaurants, however, because of the shortness of the time. If they did so they had to run in order to be back by 12:30. On the day of the accident one girl was drawing the truck, while the plaintiff, with two others, were kneeling on it. They had ridden from the powder room, where they worked, in the ware room, and were near the door between the two on the return trip, when in turning a corner the truck slid, and one girl jumped off. The other two fell to the floor, the plaintiff receiving injuries to her knee and ankle. This was a few minutes before 12:30.

The evidence for the defendant tended to show these facts: The company had a lawn and recreation ground, about an acre in extent, fenced in with its buildings, and five or six acres outside, including a ballground, all of which were accessible to the employees when not at work. The defendant had no control over them during the noon intermission. Usually at this time half of the girls went down to a restaurant on or near the factory premises. The work of the girls in the plaintiff's department was putting paper boxes on the powder machine. They had nothing to do with the trucks, which were handled by men. The assistant superintendent had cautioned the plaintiff against using the trucks, telling her that it was against the rules and very dangerous. He knew the girls had ridden on the trucks, and he and other representatives of the company frequently warned them against the practice. The subforeman of the powder room (called the foreman by the plaintiff) had no authority to permit the girls to use the trucks as playthings. All the foremen were instructed to prevent the girls from getting on the trucks.

[1] 1. The conflict of evidence as to the attitude of the company toward the girls' practice of playing with the trucks must, of course, be resolved in favor of the plaintiff. In order for the judgment to be upheld the evidence must have warranted two findings—that the plaintiff was injured in the course of her employment, and that the injury arose out of her employment. The fact that she was working by the hour, and that the accident took place out of working hours, does not conclusively establish that it did not occur in the course of her employment. The shortness of the intermission suggests that it was the expectation that most of the employees would remain on the premises, and the practice shown by the evidence confirms this. The purpose of the plaintiff and her associates in remaining in the factory after their lunch had been eaten was presumably to be on hand when work was commenced, in order that there might be no delay—a matter in which the employer had an obvious interest. Their situation was quite like that of a workman who arrives at the factory and is fully prepared to begin work a few minutes before the whistle blows. In the leading English case on the subject, which has been frequently cited with approval in this country, the scope of the decision was fairly indicated by this language of the headnote:

"A workman was paid by the hour for the number of hours per week that he was actually engaged in his work, not including the midday dinner hour. During that hour he was at liberty to stay and take his meal on the premises, or to go elsewhere. He stayed on the premises, and sat down to eat his dinner, and while so doing a wall fell upon him, and he was injured. *Held*, that during the dinner hour there had been no break in the employment of the workman, and that he was entitled to claim compensation." Blovelt v. Sawyer, 1 K. B. 1904, 271.

In the opinion of the Master of the Rolls the whole situation was gone over in these words:

"On the evidence as it stands on the judge's notes I should have felt no difficulty, because it would appear prima facie to indicate that the man was in his master's employment during the whole of each day, from the time at which he went to his work to the time when he came away,

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and equally during the dinner hour, if he stayed, as during any other part of the time. He would be there on the contract with his master during all those hours, either directly in order to do that for which he was employed or for some purpose ancillary thereto. That would embrace all his movements within the ambit of the factory, going or coming or stopping there for any purpose ancillary to his work. But we are told that there were admissions made between the parties, which do not appear on the judge's note, that men in the position of the applicant were not paid by the day or week, but by the hour, and that the dinner hour was excluded from the computation of his wages, and was not a time during which he was earning pay. That creates a difficulty, or, at all events, requires consideration. It seems to me, however, that if the dinner hour can be brought in as part of the time which is given by the workman for some purposes ancillary to his work, such as feeding himself, which is, of course, essential to enable him to do his work, it would be taking too technical a view to say that the pause in the actual course of his work for the purpose of eating his dinner was a break in his employment from the time that he stopped work to the time at which he began again. It seems to me that, notwithstanding what is alleged as to the payment being for the hours in which the applicant was actually engaged in work, and not for the time in which he took his meals, we must take a broader view, and treat him as continuing in the employment of the master by the consent of the master, inasmuch as it is for the master's advantage that the workmen should have an opportunity to feed themselves. A workman would do his work all the better by taking his meal at that time, and if it is part of the contract between him and his master that he may do so upon the works instead of going away, that may be a matter of mutual convenience. A man might, for instance, live at a distance, and it might be desirable, from the master's point of view, that he should not tire himself by going to and fro for his food instead of reserving his strength for his work. It does not seem to me that, as a matter of law, it can be said that, when sitting down to his dinner, the applicant had ceased to be in his master's employment. From the mere facts that he was not paid for this particular time, and that he was not engaged in the main purpose of his work, it cannot, as a matter of law, be said that he had ceased to be in the employment of his master." Pages 273, 274.

One of the Lord Justices said:

"It also appears that he was not obliged to leave the place where he was working and obtain shelter and food elsewhere. That being the case, how can it be said that the accident did not occur in the course of his employment?" Page 275.

Another added:

"In my view it can make no difference if the fact is that by the terms of the particular engagement the workman was to have the right, if so minded, to get his dinner on the employer's premises. I think it would be to place a narrow construction on the act if we held that the accident to the applicant did not occur in the course of his employment." Page 276.

Of an employee who during the noon intermission, after eating his lunch on the premises, fell into the river and was drowned, it has been said:

"All the circumstances and facts tend to show that up to the time he expected to resume his work when lunching time had expired, and hence he was within the scope of his service when walking at this place." Milwaukee Western F. Co. v. Industrial Commission, 159 Wis. 635, 642, 150 N. W. 998, 999.

Other expressions bearing on the matter are:

"The relation of master and servant, in so far as it involves the obligation of master to protect the servant, is not suspended during the noon hour, where the master expressly, or by fair implication, invites his

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servants to remain on the premises in the immediate vicinity of the work." Bradbury's Workmen's Compensation (3d Ed.) 524.

"As directly applied to the noon intermission, it is a long and well-settled rule that the service tie, or contractual relations and obligations between the master and servant, is not broken by such suspension of all activities directly beneficial to the employer." Haller v. City of Lansing, 195 Mich. 753, 758, 162 N. W. 335, 337 (L. R. A. 1917E, 324).

See, also, Boyd's Workmen's Compensation, § 481; 1 Honnold on Workmen's Compensation, § 111; Etherton v. Johnson Knitting Mills Co., 184 App. Div. 820, 172 N. Y. Supp. 724; Racine Rubber Co. v. Industrial Commission, 165 Wis. 600, 162 N. W. 664; Griffith v. Cole Bros. et al. (Iowa) 165 N. W. 577, L. R. A. 1918F, 923; Riley v. Cudahy Packing Co., 82 Neb. 319, 117 N. W. 765; In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318.

We conclude that there was room for a finding that the plaintiff's injury occurred in the course of her employment. If it had been the result of some accident which was due to the physical conditions under which the work was performed—say to the falling of plaster in the rooms where the girls were playing—this would be quite obvious, and the judgment for the plaintiff would clearly be warranted.

[2, 3] 2. Whether the plaintiff's injury arose out of her employment is a more difficult question. Injuries received in play are not usually capable of being so classified. Two illustrative cases are reported, passed upon by a commission and a committee of arbitration, which are in some respect quite similar to that under consideration. Socquet v. Connecticut Mills Co., Conn. W. C. C. C. Digest, 1914-16, p. 635; Thompson v. W. L. Douglas Shoe Co., 2 Mass. W. C. C. 145. If the present case is to be taken out of the general rule, it must be upon the ground that the habit of the girl employees to play with the trucks during the noon intermission, with the knowledge and express consent of the foreman, and without objection by any one representing the defendant, made such practice one of the conditions under which the business was carried on, upon much the same principle as employers are held liable for the results of horseplay which had grown into a custom. White v. Stockyards, 177 Pac. 522. Injuries have been held to arise out of the employment whenever they are "such as the character of the business or the conditions under which it is carried on make likely, and the result either was or should have been in contemplation of the employer." Jacquemin et al. v. Turner & Seymour Manufacturing Co., 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E, 496. The plaintiff's participation in the use of the truck would not seem necessarily to bar her recovery, her conduct being of a kind to be expected in girls of her age, and the question of her want of care not being material, the action not being founded on her employer's negligence.

The trial court gave an instruction to the effect that, if the plaintiff was injured as a direct and natural result of a risk reasonably incident to the employment in which she was engaged, it must be considered as arising out of and in the course of her employment. This is complained of, but substantially the test proposed has often been approved. Challis v. London & South Western Railway, 2 K. B. 1905, 154, 157; Brice v. Edward Lloyd, Limited, 2 K. B. 1909, 804, 810; Holland-St. Louis Sugar Co. v. Shraluka (Ind. App.) 116 N. E. 330; Pace v. Appanoose County (Iowa) 168 N. W. 916; Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. See, also, Benson v. Bush, 178 Pac. 747, decided February 14, 1919.

In a case in which the decision was against the employee the general rule was thus stated and illustrated:

"The same right to compensation will follow if an injury arising from a risk of the business is suffered while the employee is doing something which, although quite outside of his obligatory duty, is permitted

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by his employer for their mutual convenience, such as eating his dinner on the premises, or any similar act to the performance of which the employer has assented. * * *

"In the present case the commissioner has found, in substance if not in words, that the employer knew of his employees' custom of heating bottles in the dry room at the mouth of the hot-air pipe, and, upon principles familiar to courts before compensation acts were invented, the right to so heat bottles became, by the tacit consent of the employer, a term or condition added to the contract of employment, so that if the injury, which clearly arose from a risk of the business, had occurred while the claimant was engaged in heating his bottle at the customary time and place, he would doubtless have been entitled to compensation." Mann v. Glastonbury Knitting Co., 90 Conn. 116, 120, 121, 96 Atl. 368, 369 (L. R. A. 1916D, 86).

In a case where during the noon hour an employee was found crushed by an elevator it was said:

"The deceased was required to take his lunch to the plant with him, and was permitted and expected to eat it upon the premises. No particular place was assigned to any of the employees to eat their lunch but each man was permitted to eat it wherever he desired about the plant. All the employes used the elevator during the lunch hour as they had occasion to, just as they used it during the hours the plant was in operation. Whether the deceased was negligent in his operation of the elevator, or in attempting to get off while it was in motion, is immaterial. * * * The proof amply sustains the finding that the accident arose out of and in the course of the employment." Humphrey v. Industrial Commission, 285 Ill. 372, 375, 120 N. E. 816, 817.

A workman has been allowed to recover under the compensation act where he caused an explosion by lighting his pipe near a gasoline can in a toolhouse, to which he had gone to eat his dinner, having violated no rule, and not knowing of the presence of the vapor. Haller v. Lansing, 195 Mich. 753, 162 N. W. 335, L. R. A. 1917E, 324. In Dzikowska v. Superior Steel Co., 259 Pa. 578, 103 Atl. 351, L. R. A. 1918F, 888, the employee was permitted to recover, where he set fire to his oily apron while lighting a cigarette; and in Whiting-Mead Commercial Co. v. Industrial Accident Co. (Cal.) 173 Pac. 1105, an employee's injury, due to his setting fire in the same way to a turpentine soaked bandage on his hand, was held to fall within this rule, quoted from another case:

"Such acts as are necessary to the life, comfort, and convenience of the servant, while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but, in a remote sense, these acts contribute to the furtherance of his work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment." Archibald v. Workmen's Compensation Commissioner, 77 W. Va. 448, 451, 87 S. E. 791 (L. R. A. 1916D, 1013).

It would perhaps not unduly extend the principle to say that the employer might, under some circumstances, have an interest in his employee's taking suitable exercise in a brief interval allowed for refreshment and rest.

Inasmuch as the evidence may be regarded as establishing that the play in which the plaintiff was injured had become a settled custom, with the knowledge and indeed the express approval of the foreman in charge of the department, and without objection on the part of any

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one, the court is of the opinion that her injury may be regarded, not only has having occurred in the course of her employment, but as having arisen out of it.

The judgment is affirmed.

All the Justices concurring.

SUPREME COURT OF KANSAS.

LINDSAY

v.

HALSTEAD MILLING & ELEVATOR CO. (No. 21985.)*

EVIDENCE—ADMISSIBILITY—ADMISSIONS.

Under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942), a written report concerning the injury of an employee, made by another employee or manager, at the request of the employer, which report contains statements regarding the accident and the injury to the employee, but which shows, on its face, that the statements are those of the injured employee, and are not the admissions of the employer, is not admissible in evidence for the purpose of proving that the accident occurred, or of proving the nature of the injury.

(For other cases, see Evidence, Dec. Dig. § 243[4].)

Appeal from District Court, Harvey County.

Action by Nancy E. Lindsay against the Halstead Milling & Elevator Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Notftzger & Gardner, of Wichita and Samuel A. Harper, of Chicago, Ill., for appellant.

Clarence Spooner, of Newton, for appellee.

MARSHALL, J. The plaintiff, under the Workmen's Compensation Law (Gen. St. 1915, §§ 5896-5942), recovered judgment for the death of her husband, David E. Lindsay, alleged to have been caused by an injury sustained by him while in the defendant's employ. The defendant appeals. The contest was over the cause of Lindsay's death.

The first question argued by the defendant is that "there was no competent evidence offered to prove that the deceased's death was caused by an injury, and the demurrer of the defendant to the evidence of the plaintiff should have been sustained." The only evidence which tended to prove that Lindsay had received any injury was contained in a report made, apparently, by the defendant to some liability insurance company. A part of the information contained in the report was given by Lindsay to D. T. Davis, an employee of the defendant and manager of the elevator in which it was alleged that Lindsay was injured. At the defendant's request, Davis obtained the information two days after the alleged accident occurred, and sent the report to the defendant. That report showed that Lindsay stated that he had been injured while he was replacing the

*Decision rendered, March 8, 1919. 179 Pac. Rep. 360. Syllabus by the Court.

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driving belt of the elevator which had become choked; that the belt had slipped off; and that he felt the injury in his bowels. The report contained the following statement: "We believe his explanation above is correct—a strain of the abdomen by misapplied exertion." It is argued that the report was incompetent; that it was hearsay; that it contained self-serving declarations by Lindsay; and that it was not a part of the res gestæ. That part of the report relating to the accident and the nature of the injury sustained by Lindsay was based on information obtained from him. He was the only person that knew about the accident; no other person saw it. If Lindsay had made the report it would have been inadmissible, because it would have been self-serving, and not a part of the res gestæ. Neither Davis nor the defendant knew anything about the accident or the injury occasioned thereby, except through information received from Lindsay, although the report did contain statements touching other matters of which both Lindsay and the defendant had actual knowledge. So far as the latter statements were concerned, the report was admissible; but so far as the statements relating to the accident, and the injury were concerned, it was inadmissible for the reason that those statements were entirely on information obtained from Lindsay, and were not admissions by the defendant that they were true. The conclusion reached is supported by Englebretson v. Industrial, etc., Com., 170 Cal. 793, 151 Pac. 421, C. & A. R. R. Co. v. Industrial Board, 274 Ill. 336, 113 N. E. 629, and Reck v.Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771.

In Railway Co. v. Burks, 78 Kan. 515, 96 Pac. 350, 18 L. R. A. (N. S.) 231, this court held that the reports of railroad car inspectors, regarding the condition of a car coupler, cannot be received in evidence as admission by the defendant of the facts stated in the reports, unless the reports have been adopted or promulgated in an uathoritative way by some official having power to bind the corporation by admissions.

The conclusion reached renders it unnecessary to discuss the other question presented by the defendant.

The judgment is reversed, and judgment is rendered for the defendant.

All the Justices concurring.

COURT OF APPEALS OF KENTUCKY.

BATES & ROGERS CONST. CO. ET AL.

v.

ALLEN.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION —REVIEW—FINDINGS OF BOARD.

Findings of Workmen's Compensation Board upon disputed facts are not reviewable.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION —FINDINGS OF BOARD—REVIEW.

Finding of Workmen's Compensation Board upon undisputed facts

* Decision rendered, March 28, 1919. 210 S. W. Rep. 467.

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is a finding of law, although it may be styled a finding of fact, by board, and is reviewable by Court of Appeals.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION PROCEEDINGS—REVIEW OF QUESTIONS OF LAW.

In trial of common-law case before a jury, where there is no dispute as to the facts, the question for decision is one of law for the court and not for the jury, and the same rule is applicable to compensation cases.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION —FINDING OF BOARD—REVIEW.

In view of Ky. St. Supp. 1918, § 4935, finding of Workmen's Compensation Board as to whether employee is entitled to compensation as a matter of law is reviewable by Court of Appeals.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

5. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE OF INJURY—NOTICE TO FOREMAN—"AGENT OR REPRESENTATIVE."

Under Ky. St. Supp. 1918, § 4917, providing that injured employee's failure or delay in giving notice of injury shall not bar proceedings for compensation, if it be shown that employer, or his agent or representative, had knowledge of the injury, the knowledge of a foreman or boss in charge of a crew or gang of men *held* sufficient; such foreman or boss being an "agent or representative" within the statue.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE TO EMPLOYER—"KNOWLEDGE OF THE INJURY."

Injured employee's statement to foreman that he had been hit in the eye was insufficient to give the foreman "knowledge of the injury," within Ky. St. Supp. 1918, § 4917, providing that failure or delay in giving employer notice shall not bar injured employee's right to compensation, if it be shown that employer had knowledge of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE OF INJURY—"NATURE AND EXTENT OF THE INJURY SUSTAINED."

Notice to employer of "nature and extent of the injury sustained," under Ky. St. Supp. 1918, §§ 4914, 4915, need not give a full or exact description of the injury, in view of section 4917; notice giving employer such knowledge as will enable him to provide the necessary medical or other attention that the nature or extent of the injury demands being sufficient.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE OF INJURY—ACTUAL NOTICE—KNOWLEDGE OF INJURY.

Employer's actual knowledge of injury, to excuse, under Ky. St. Supp. 1918, § 4917, the want of notice or delay in giving the notice required by sections 4914, 4915, need be only such knowledge of the injury as to apprise employer of its nature and extent, so that he may protect himself by giving employee the necessary medical attention.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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9. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE OF INJURY.

Ky. St. Supp. 1918, § 4914, requiring notice to employer of employee's injury "as soon as practicable" after the happening thereof, to entitle employee to compensation, should be given a liberal construction, so as not to deprive meritorious claimant of compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

10. MASTER AND SERVANT—WORKMEN'S COMPENSATION —FAILURE TO GIVE NOTICE—EFFECT.

Under Ky. St. Supp. 1918, §§ 4914, 4915, 4917, compensation will not be denied on ground of failure to give, or delay in giving, employer notice of the injury, where such failure or delay is due to an honest mistake and did not prejudice the employer.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

11. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE—"MISTAKE."

Failure to give employer timely notice of injury, where caused by addressing notice to "Mayfield," instead of "Maysville," was occasioned by a "mistake," within Ky. St. Supp. 1918, § 4917, providing that delay or failure to give notice, where occasioned by mistake, shall not preclude recovery of compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Mistake.)

12. MASTER AND SERVANT—WORKMEN'S COMPENSATION —NOTICE.

Where injury to employee's eye caused impairment of the eyesight at time of accident and was not aggravated by failure to receive prompt medical attention, employee's failure to give employer notice required by Ky. St. Supp. 1918, § 4914, without delay, was not prejudicial to employer, and does not preclude recovery of compensation, where such delay was due to mistake, under section 4917.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

13. MASTER AND SERVANT—WORKMEN'S COMPENSATION —DELAY IN GIVING NOTICE.

Where claim of injured employee to compensation is meritorious, and employer has not been prejudiced by employee's delay in giving notice of injury, required by Ky. St. Supp. 1918, §§ 4914, 4915, the want of mistake or reasonable cause, to preclude recovery of compensation under section 4917, should be very convincing.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

14. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

Workmen's Compensation Act, having been primarily intended for the protection and benefit of employees, should not be given such a strict or technical construction as to deprive a meritorious claimant of compensation to which he would have been entitled if he had prosecuted claim with diligence.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

Appeal from Circuit Court, Mason County.

Proceeding by Henry Allen under Workmen's Compensation Act for compensation for injury, opposed by the Bates & Rogers Construction

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Company, employer. From judgment of circuit court awarding compensation, on appeal by employee from a finding of the Workmen's Compensation Board denying compensation, the employer and the Workmen's Compensation Board appeal. Judgment of circuit court affirmed.

Fred Forcht, of Louisville, and Stanley Reed, of Maysville, for appellants.

Chas. H. Morris, Atty. Gen., and D. M. Howerton, Asst. Atty. Gen., A. D. Cole, of Maysville, and Lawrence Leopold, of Louisville, for appellee.

CARROLL, C. J. This case, under the Workmen's Compensation Act (Laws, 1916, c. 33), is brought here by the employer, Bates & Rogers Construction Company, from the Mason circuit court, to which an appeal was prosecuted from the decision of the Workmen's Compensation Board by the appellee, Henry Allen, who had been denied compensation by the board.

There is no dispute about the facts, which are substantially as follows: Henry Allen was in the employ of the appellant Bates & Rogers Construction Company at lock and dam No. 33 on the Ohio river near Maysville, Ky., during the month of November, 1916. He went from Louisville, Ky., where he obtained the employment through the agency of the state free employment office, to Maysville, and about four days after he commenced work for the construction company received the injury for which he claimed compensation.

He testified before the board on the hearing of his claim that the injury happened in this manner:

"Well, I was tearing up the dinky track, the one the little engine hauls on, hauls the cars, and working on a kind of trestle; the men would take up the rail and carry it back, and where the angle iron holds them together they wouldn't come apart; there was a big, heavy fellow, called Cobb, and he was hitting on these pieces of iron that held the rail together with a sledge, to loosen them, so I could get them apart, and something flew up and hit me in the eye, and that's the way I got hurt."

Asked as to whom he told about it and what occurred afterwards, he testified as follows:

"A. At that time there was several men knew I got hit in the eye with something. I told the boss I got hit. Q. Who was the boss? A. Little short fellow, they called Tom—wore a straight hat like a cowboy. Q. Do you know what his last name was? A. No. sir; Tom is all I know. I was not there long enough to get acquainted. I was only there a little over a week. Q. Was Tom the man in charge of you? A. Yes, sir. Q. Representing Bates & Rogers Construction Company? A. He was their foreman. Q. How long did you continue to work after you received this blow in the eye? A. Well, I worked—that was in the morning, and I worked out that day, and I worked the next day, and the next morning I left; came back to Louisville. Q. The day after you were hurt, did your eye show any evidence of being hurt? A. Well, it pained me all the time. When it was first hurt, I just thought something was in there, and would work out, and quit hurting right away. I didn't have any idea it would terminate the way it did; but then it would feel all right for a while, and commence hurting again, and kept on, until it got inflamed, so I could'nt sleep. Q. Did you tell the foreman anything about it afterwards? A. Well, the foreman knew about it; knew when I got hurt; knew the last day I worked. Q. How did he know that? A. Well, I told him, when I first got hit, I was hit in the eye with something. Q. After you came to Louisville, what did you do A. Well, I came home, and after I went and came home I couldn't work, and I went to the City Hospital. Q. How long were you in the hospital? A. I judge about 11 days. I went in on Monday, and came out the following Sunday

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week. Q. Mr. Allen, what was the condition of your eye before you were struck with whatever substance struck you? A. I had good eyesight. Q. How is your sight in the injured eye since that blow? A. Well, I haven't got any sight at all. I can close this eye and tell light; that's all I can see. I can't see anything. Q. Do you know whether that condition was brought about by this blow in your eye? A. Well, I never had anything the matter with my eye in my life until I got hit with that piece, whatever it was; never had any diseases in my eyes, or anything, or any complaint. Q. Now, after you were released from the hospital, what attempt, if any, did you make to notify Bates & Rogers Construction Company of your injury? A. Well, I wrote them, the best of my memory, about three letters. Q. And when was the first one that you wrote? A. Well, it was before Christmas, and then I wrote one around Christmas, and then I wrote another letter, I think a couple of weeks after Christmas, and it came back. I wrote to the wrong place. I had it Mayfield, instead of Maysville, and then I went to Bob Lucas, and he wrote a letter, and kept a couple of letters for me. Q. There is an envelope; read how that is addressed. A. Well, that is Mayfield, Ky.; that's the way I wrote. Q. That is a stamped envelope. A. Yes, sir. Q. It has across the face the figure of hand, 'Returned to the writer unclaimed.' Will you file that as part of your deposition? A. Yes, sir. 'Law Offices Robt. H. Lucas, 316-317 Louisville Trust Building. Louisville, Ky., January 30, 1917. Bates & Rogers Construction Co., Mayfield, Ky.—Gentlemen: I have been employed by Mr. Henry Allen of this city to represent him in a claim against you growing out of an injury which he received while in your employ on lock and dam No. 33 on or about November 1, 1916. While engaged in his work he was struck in the eye with a piece of steel, which caused him to lose the sight of his eye. Dr. Wolfe, in the Atherton Building, this city, has been attending him. Kindly investigate this matter and inform us whether or not we may expect a settlement and oblige. Yours very truly [signed] Robert H. Lucas.' Q. What time in the morning was it you got hurt? A. Must have been around 10 o'clock, 9 or 10 o'clock. Q. And you continued to work all that day? A. Until 3 that evening. Q. And went to work the next morning? A. Yes, sir; and worked until 3 the next evening. Q. How many doctors did Bates & Rogers Construction Company have at their camp? A. If they had any, I never saw them. Q. Did you ask for a doctor? A. I never heard anybody say anything about any doctor; I never heard of any doctors. Q. Did you ask any of the bosses for a doctor or for any medicine for your eye? A. No, sir; I asked one fellow where there was a hospital, and he said they had a place at Maysville where they taken men who was sick and hurt. Q. You say there was a man named Tom there, who was your boss? A. Yes, sir; Tom. Q. Did he pay you off? A. I don't know —they called it a job and jump job—you can get your money any time. Q. Did you go to the office to get your pay? A. No, sir; you had to go to the commissary. Q. You did that, did you? A. Yes, sir. Q. Did you say anything to the commissary about getting hurt—about quitting because you were hurt? A. No, sir. Q. Or the man at the office? A. No, sir. Q. Did you tell the man at the commissary, or the man where you got your money, why you were quitting. A. No, sir; never told anybody but the foreman. Q. That is this man 'Tom,' you don't know his last name? A. No, sir; that's all I know him by—Tom. * * * Q. When you read that notice, you knew you were working under the Workmen's Compensation Act? A. I knew I was working under the compensation all the time; I knew that. Q. You say you wrote three letters to Bates & Rogers at Mayfield, Ky.? A. Yes, sir. Q. How did you happen to write it Mayfield, when you knew their plant was located at Maysville? A. I was taking Mayfield for Maysville all the time; that's the way I made the mistake. I thought it was Mayfield, instead of Mays-

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ville. Q. What did you say in your letters to the Bates & Rogers Construction Company? A. Well, that has been a long time. I don't know whether I can think exactly, or not, what I wrote now. I don't hardly think I could. Q. Well, about what you said? A. Well, I know this; I told them I was hurt there by being hit there with something in the eye, and I lost my sight out of one eye, and I know I asked them if they couldn't help me a little. Q. Was that the tenor of what you said in all three of the letters? A. Yes, sir; just about the same. Q. Were these letters returned to you? A. Yes, sir. Q. What became of them? A. Well, in fact, I never paid any mind to them; I couldn't say. Q. When did you first find out that you had made a mistake between Mayfield and Maysville? A. Well, I never found that out until I was talking to Mr. Leopold. Q. Did Mr. Lucas tell you? A. No; Mr. Lucas never did know. Mr. Lucas didn't know; he thought it was the same I did."

John Reed, who was a laborer with Allen, testified as follows:

"Q. Were you up there with Henry Allen, the plaintiff in this case? A. I worked with him there; yes, sir. Q. Were you housed in the same bunkhouse with Henry Allen? A. Yes, sir. Q. Did you have occasion to observe him before the time he complained of an accident? A. Yes. Q. What was the apparent condition of his eye, his left eye, at that time? A. I didn't see anything wrong with it. Q. Was there any evidence of redness or inflammation? A. No. Q. Or being bloodshot or anything? A. No. Q. When was the first time you saw anything the matter with his eye, his left eye? A. Well, it was one evening that, after our shift was out, he complained of his eye, and same night he was up and complained with it. Q. You didn't see the accident? A. No; I didn't see it. Q. Well, now, did this eye apparently give him much or little trouble when you first saw it? A. Well, he complained of it; I couldn't say as to what pain he suffered or what seriousness happened to his eye, but he complained of it; that's all I know. Q. Do you know whether he was able to sleep that night or did he— A. Well, he was up at one time, on one night, there in the shanty we stayed in. I don't know what pain he suffered with his eye. It seemed to be inflamed. Q. Do you remember why he was not sleeping? A. Well, he complained of his eye is what he told me. Q. Said his eye hurt so he was unable to sleep; is that what he said? A. Yes; said his eye hurt."

Dr. C. T. Wolfe, who was a member of the medical staff of the Louisville City Hospital, testified that Allen was admitted to the hospital in the latter part of November on account of an injury to his eye that had the appearance of having been made by a foreign body or a blow; that Allen told him that the injury to his eye was caused by a piece of metal that flew from a sledge or a piece of iron that was being struck with it by a colaborer; that the eyesight was practically destroyed by the injury. He further testified as follows:

"Q. What was the condition of the eyeball? A. He had a lacerated wound, if I remember rightly, near the outer edge of what we call the cornea—that is the clear part of the eye. The tissues were torn and lacerated, and it looked as though— I am sure something did strike him in the eye. Q. Did the symptoms you found correspond with the history of the case as given to you? A. Well, the history that he gave me was— Do you want me to tell you what he told me? Q. Yes. A. Told me he was working with metal, and that he or one of his fellow workmen were using a sledge, and in his opinion a piece of the metal flew up, as a result of the blow of the sledge, and struck him in the eye. That's all I asked him; didn't care to know any more about it. Q. What is the present vision of the eye, do you know? A. He has perception to light—reduced merely to telling when the electric light is on. Q. Do you think unquestionably this cataract of this particular man is due to that injury? A. He had a lacerated wound, and in what we call the danger zone, and it was of such character as made me believe that the cataract—formation

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of the cataract—was directly due to the blow. Q. That is you opinion now? A. That is my opinion; yes, sir."

This was all the evidence heard by the Compensation Board, and it made the following findings of fact:

"(1) The alleged accident to the plaintiff is proven to have occurred on the 18th or 19th of November, 1916, and the first notice of accident and injury which defendant received was mailed March 5, 1917. This notice was not given as soon as practicable and was not a compliance with section 33.

"(2) The plaintiff failed to show the alleged 'Tom' to be an agent or representative of defendant.

"(3) The plaintiff failed to show that 'Tom,' or the defendant, had knowledge of the alleged injury.

"(4) Plaintiff's failure or delay in giving proper notice was not occasioned by mistake or other reasonable cause.

"(5) When plaintiff was alleged to have written his letters was too late under the circumstances to give the notice under the act."

On these findings of fact the board found as a matter of law that Allen was not entitled to compensation and dismissed his claim.

As the case turns on the sufficiency of the notice to the employer of the injury, it will be necessary to refer to pertinent sections of the Workmen's Compensation Law. It is provided in section 4914 of volume 3, Kentucky Statutes, that—

"No proceedings under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless a claim for compensation with respect to such injury shall have been made within one year after the date of the accident."

Section 4915 provides that—

"Such notice and such claim shall be in writing, and the notice shall contain the name and address of the employee and shall state in ordinary language the time, place of occurrence, nature and cause of the accident, with names of witnesses, the nature and extent of the injury sustained and the work or employment in which the employee was at the time engaged."

And in section 4917 it is provided that—

"Such notice shall not be held invalid or insufficient by reason of any inaccuracy in complying with section 4915 hereof unless it be shown that the employer was in fact misled to his injury thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this act if it be shown that the employer, his agent or representative, had knowledge of the injury or that such delay or failure to give notice was occasioned by mistake or other reasonable cause."

In section 4935 provision is made for a review of the findings of the Compensation Board by an appeal to the circuit court, but this power of review is limited to determining whether or not—

"1. The board acted without or in excess of its powers. 2. The order, decision, or award was procured by fraud. 3. The order, decision or award is not in conformity to the provisions of this act. 4. If findings of fact are in issue, whether such findings of fact support the order, decision or award."

At the very outset we are met with the contention of counsel for Bates & Rogers Construction Company that the findings of the Workmen's Compensation Board on the questions of fact are supported by sufficient evidence to sustain them, and of course, if this contention is sound, and the board had another, we are not at liberty to go back to the findings of fact made by the board for the purpose of determining their correctness. It would further necessarily follow from this that the ruling of the board that Allen was not entitled to compensation should be sustained, because in its findings of fact the board held that the

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evidence did not show that "Tom" was the representative of the Bates & Rogers Construction Company, and besides did not have the "knowledge of the delay of Allen in giving the statutory notice was not occasioned by "mistake or other reasonable cause."

[1, 2] We think, however, counsel misconceives the effect of the findings of fact made by the Compensation Board. The rule relied on by counsel as to the effect of the findings of fact by the board only applies when there is a disputed issue of fact, and on the disputed facts the board makes a finding. If there is no issue of fact, or if the facts are undisputed, the question on the facts becomes one of law, and the finding of the board is a finding of law, and not of fact, although it may be styled a finding of fact by the board.

[3] It is a familiar principle in our practice that when, in the trial of a common-law case before a jury, there is no dispute as to the facts, the question for decision is one of law, to be made by the court, and not the jury, and we think the same rule should be applied in compensation cases. Hochspeier v. Industrial Board, 278 Ill. 523, 116 N. E. 121, L. R. A. 1918F, 227.

[4] The question, therefore, being one of law, and not of fact, we do not find in the Compensation Act anything that precludes us from inquiring into the correctness of a finding of law made by the board. We think the right of the court to review it is authorized by that clause in section 4935 of the statute giving to the court authority to determine whether or not "(3) the order, decision or award is not in conformity to the provisions of this act." If Allen, on the undisputed facts, was entitled to compensation, then the decision of the board was not in conformity with the provisions of the act, and so if the board, where there is no dispute as to the facts, should allow compensation, the court could review its finding of law.

On the record it is conceded that there are only two questions in the case that need to be considered. One is whether the Bates & Rogers Construction Company had knowledge of the injury, and the other, if it did not, the failure or delay in giving the notice required by the statute was occasioned by "mistake or other cause."

The statute in section 4914 provides, as we have seen, that—

"No proceeding under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof."

It further provides in section 4915 that "such claim shall be in writing." And it is contended upon the one side that the notice required by these provisions of the statute was not given, while on the other it is insisted that the rights of Allen were saved by section 4917, providing in part that—

"Want of notice or delay in giving notice shall not be a bar to proceedings under this act if it be shown that the employer, his agent or representative, had knowledge of the injury.

It being conceded that the employer, Bates & Rogers Construction Company, did not have personal knowledge of the injury, the first question we may take up is: Did its agent or representative have knowledge of the injury?

[5] We think the evidence is sufficient to show that "Tom was, within the meaning of the statute, the agent or representative of the Bates & Rogers Construction Company; there being no contradiction upon this point of the evidence of Allen, who says that "Tom" was the man in charge of him, representing the Bates & Rogers Construction Company as their foreman; and a "foreman" or "boss" in charge of a crew or gang of men is an agent or representative of the employer, and his knowledge of the injury has the same effect as if the employer in person had knowledge of it. Fell's Case, 226 Mass. 380, 115 N. E. 430; In re Simmons (1918) 117 Me. 175, 103 Atl. 68; Hornbrook-Price Co. v.

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Stewart (Ind. App. 1918) 118 N. E. 315; Joliet Motor Co. v. Industrial Board, 280 Ill. 148, 117 N. E. 423; R. F. Conway Co. v. Industrial Board, 282 Ill. 313, 118 N. E. 705; State ex rel. v. Pennington County, 132 Minn. 251, 156 N. W. 278; In re Bloom, 222 Mass. 434, 111 N. E. 45; Pellett v. Industrial Commission, 162 Wis. 596, 156 N. W. 956, Ann. Cas. 1917D, 884; Parker Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; In re Murphy and In re American Mutual Liability Ins. Co., 226 Mass. 60, 115 N. E. 40.

[6] But we do not think that "Tom," the foreman, had the "knowledge of the injury" that is required by the statute. According to the evidence of Allen, he merely told the boss, who was present at the time of the accident, that "I got hit." "Well, I told him, when I first got hit, I was hit in the eye with something." Knowledge by the foreman or employer that an accident has happened, or knowledge that an employee has been hit with something as a result of the accident, is not "knowledge of the injury." An employee might meet with an accident, he might get hit with something, and the employer or his agent or representative might have actual knowledge of the fact that an accident had happened, and that an employee got hit with something as a result thereof; but this would not convey to him the knowledge of the injury contemplated by the statute.

[7] The purpose of the statute was that knowledge of the injury by the employer or his agent or representative should dispense with the necessity for giving the written notice required when the employer or his agent or representative did not have personal knowledge of the injury. If the written notice is given, the statute provides that it shall state the "nature and extent of the injury sustained," although this does not mean that the full or exact nature or extent of the injury shall be brought to the knowledge of the employer, his agent or representative, but only that he should have such knowledge of its nature and extent as would enable him to take such steps as might be deemed prudent or advisable to provide the necessary medical or other attention that the nature or extent of the injury seemed to demand. We say this because it is provided in section 4917 that the written notice shall not be held invalid or insufficient by reason of any inaccuracy, unless it be shown that the employer was in fact misled to his injury thereby.

[8] We therefore think that the actual notice that takes the place of a written notice should be sufficient to convey to the employer the same knowledge of the injury that would be required if a written notice was given. Looking at the matter from this standpoint, our opinion is that mere knowledge on the part of the employer that his employee has been hit with something, or that an accident of some kind has happened, is not "knowledge of the injury," within the meaning of the law. An employee might get hit and not sustain any injury, or he might get hit and sustain an injury so trifling as that no medical or other attention would be needed, or he might get hit and receive such an injury as that attention and treatment would be required. The notice is intended for the protection of the employer as well as the benefit of the employee, and it must be of such fullness and sufficiency as to apprise the employer of its nature and extent, so that he may for his own protection, as well as the benefit of the employee, do whatever seems necessary under the circumstances to save himself as well as he can from further loss or cost on account of the injury.

In Bushnell v. Industrial Board of Illinois, 276 Ill. 262, 114 N. E. 496, it appears from the opinion that an employee was engaged in tearing up a floor. He was using a pick, one end of which he stuck under the floor, and the floor was raised and torn up by putting his foot on the other end of the pick and giving the handle a pull. In some manner the pick slipped, and he twisted his leg, sustained an injury. The injury was apparently slight at first. No formal notice of the accident was

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given. Two conversations with the foreman were relied upon as dispensing with formal notice. On the following day the foreman noticed the employee limping, and asked as to what was the matter. The employee replied that he had hurt his leg in tearing up the floor. Some days later the foreman again noticed that the employee was limping, and again asked him as to what was the trouble. On this occasion the employee stated that he had a "game leg." It was not claimed that in either of the conversations it was intimated that the injury was serious, or that the foreman had any knowledge of the facts or circumstances of such injury, other than that obtained from these conversations, and the court said:

"We think it is both the spirit and intention of the act that the employer shall have notice, either by formal notice or knowledge of such facts and circumstances of the accident, as will apprise him that his employee has sustained injuries of such a character as to entitle him to compensation under the act, and that he may reasonably expect that such claim will be made. * * * The mere fact that Stewart [the injured employee] told the foreman, in response to the question as to what caused him to limp, that he had wrenched his leg in attempting to tear up the floor, without making any claim for compensation for such injury, or suffering any interruption of his work, was not sufficient notice of the facts and circumstances of the accident to entitle him to compensation under the provisions of section 24 of that act, without the giving of any other notice."

The remaining question is: Did Allen give to his employer notice of the accident and injury within the time and manner required by the statute, or, if not, was his delay or failure to give the notice occasioned by mistake or other reasonable cause?

It will be observed that the statute, in section 4914, provides that "no proceeding under this act for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof," and limits the time in which the notice may be given to one year after the date of the accident; and in section 4915 there is specified what the notice shall contain; and further it is provided in section 4917 that the notice shall not be invalid or insufficient because of a failure to describe, as required by section 4915, the time, place, nature, and cause of the accident, and the nature and extent of the injury, unless it be shown "that the employer was in fact misled to his injury thereby," and further provided that the giving of the notice will be excused if the delay or failure to give it was "occasioned by mistake or other reasonable cause."

Looking, now, to the facts, it is not contended that the letters written by Allen or the letter written by Robert H. Lucas did not sufficiently comply with the statutory requirement as to written notice, but insisted, first, that Allen did not give the notice "as soon as practicable" after the injury; and, second, that his conduct in addressing the letters to Mayfield, Ky., in place of Maysville, Ky., was not "occasioned by mistake or other reasonable cause."

Allen received the injury for which he asked compensation in the latter part of November, 1916, and his first letter informing his employer of the accident and injury was written before Christmas, 1916, the second about Christmas, and the third a few weeks after Christmas, while the letter of Lucas was written on January 30, 1917. Not receiving any answer to either of these letters, because they had been sent to the wrong address, Allen placed the matter in the hands of Mr. Leopold, who gave the Bates & Rogers Construction Company, on March 5, 1917, a sufficient notice, and in June, 1917, the matter was heard and disposed of by the board.

Allen, of course, knew the nature of his injury a few days after it was received, and how it happened, and was fully advised of the extent of it when he left the hospital in December, and within a few days after

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leaving the hospital he attempted to give to his employer the notice required by the statute, but in place of sending this notice to Maysville, where his employer was located, he sent it to Mayfield. That Allen did attempt in good faith to give the notice was clearly established by the undisputed facts. Upon failing to receive an answer to his first letter, he sent another, and, not getting an answer to this, wrote yet another, to which he received no answer and then put the matter in the hands of his attorney, Lucas, who also attempted in good faith to give the notice.

[9] The words "as soon as practicable" should be given a liberal construction, so as not to defeat, without just cause, the compensation to which a meritorious claimant is entitled, and when a claimant, acting in good faith, attempts to give the notice very shortly after he learns the nature and extent of his injury, and within the year, he should not be denied compensation, unless it appears that the employer "was in fact misled to his injury" by the failure to receive earlier notice, and there is no fact or circumstance in this record conducing to show that the delay in giving the notice prejudiced in any manner the rights of the Bates & Rogers Construction Company.

Where a notice is not given "as soon as practicable," but the failure to give it "as soon as practicable" is caused by "mistake or other reasonable cause," this excuses the failure to give the notice "as soon as practicable," and therefore, in considering the question whether a notice was given "as soon as practicable," and an excuse is offered for this failure, it becomes important to inquire into the sufficiency of the excuse, so that it may be determined whether or not the failure to give the notice "as soon as practicable" was occasioned by "mistake or other reasonable cause," and also whether the employer was prejudiced by the delay.

[10] Where the employer is not prejudiced by the failure to give the notice at as early a date as it might have been or should have been given, and where the failure to give it sooner was occasioned by an honest mistake on the part of the employee. we do not think a fair consideration of the statute warrants the rejection of the employee's claim for compensation solely on account of the delay in giving notice. It is only important that the employer should have notice of the injury as soon as practicable, in order that he may have opportunity to investigate the cause of the injury, as well as the nature and extent of it, and take such action as he may think advisable to protect his interest; and if it was made to appear that the employer's rights were prejudiced by the failure to give the notice at an earlier date than it was given, it would require stronger evidence to support the excuse for the failure or delay in giving it than should be required when the delay did not occasion any injury to the employer, or in any manner prejudice his interest.

But in this case there is, as we have said, no suggestion that the employer was prejudiced by the delay in giving the notice, or that the injury to Allen's eye was aggravated by neglect or failure to receive proper medical attention. Dr. Wolfe testified that the injury to his eye was of such a nature that the impairment of his eyesight was brought about immediately upon its happening.

[11, 12] Under the circumstances of this case we are of the opinion that the delay in giving the notice sooner was caused by mistake within the meaning of the statute, and that a fair construction of the act did not warrant the rejection by the board of Allen's claim for compensation upon the ground of his delay in giving the notice.

[13] The right to defeat it is rested entirely upon the legal ground that notice was not given as required by the statute; and where the claim is meritorious, and the employer has not been prejudiced by the delay, the want of mistake or reasonable cause that would be sufficient to excuse the giving of the notice sooner should be very convincing, to authorize the rejection of the claim.

[14] The law was primarily intended for the protection and benefit

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of employees, and its beneficent purpose should not be defeated by a strict or technical construction that would deprive the employee of the compensation to which he would clearly be entitled without contest if he had prosecuted his claim with diligence. Illustrative cases on the disposition of the court to support this view are Donahue v. Sherman's Sons Co., 39 R. I. 373, 98 Atl. 109, L. R. A. 1917A, 76, Schmidt v. O. K. Baking Co., 90 Conn. 217, 96 Atl. 963; Pellett v. Industrial Commission, 162 Wis. 596, 156 N. W. 956, Ann. Cas. 1917D, 884; Frankfort General Insurance Co. v. Milwaukee, 164 Wis. 77, 159 N. W. 581; Bloom's Case, 222 Mass. 434, 111 N. E. 45; Knoll v. Salina, 98 Kan. 428, 157 Pac. 1167; A. Breslauer Co. v. Industrial Commission, 167 Wis. 202, 167 N. W. 256; Smith v. Solvay Process Co., 100 Kan. 40, 163 Pac. 645.

Wherefore the judgment of the circuit court is affirmed.

COURT OF APPEALS OF KENTUCKY.

NELSON

v.

KENTUCKY RIVER STONE & SAND CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION—COMPENSATION.

The schedule of compensation for specific injuries under Workmen's Compensation Act, § 18, may be used by the Workmen's Compensation Board as a standard by which to measure the compensation to be allowed for injuries not specified, but falling within the general clause awarding compensation "in all other cases of permanent partial disability."

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Appeal from Circuit Court Anderson County.

On petition for rehearing. Petition overruled, and opinion extended. For former opinion, see 182 Ky. 317, 206 S. W. 473.

Lillard Carter, of Lawrenceville, and R. L. Black, of Harrodsburg, for appellant.

O'Neal & O'Neal of Louisville, and F. R. Feland, of Lawrenceburg, for appellee.

CLAY, C. Upon a reconsideration of the question involved, we see no reason to depart from our former opinion, but deem it proper to say that, in holding that the compensation for specific injuries, provided in section 18 of the Workmen's Compensation Act (Acts 1916, c. 33), was confined to those injuries and no others, it was not intended to lay down the rule that the Workmen's Compensation Board could not use the schedule contained in section 18 as a standard by which to measure the compensation to be allowed for injuries not specified, but falling within the general clause awarding compensation, "in all other cases of permanent partial disability," etc.

Wherefore the petition for rehearing is overruled and the opinion extended as above indicated.

* Decision rendered, March 11, 1919. 209 S. W. Rep. 506.

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COURT OF APPEALS OF KENTUCKY.

PENN'S ADM'R

v.

BATES & ROGERS CONST. CO.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —RIGHTS OF SERVANT.

The administrator of a deceased servant's estate cannot maintain an action against the master for the servant's wrongful death, under Const. § 241, where such servant had accepted the Workmen's Compensation Act fixing the amount of recovery for death and providing that such compensation shall be in lieu of all other liability.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Appeal from Circuit Court, Mason County.

Suit by William Penn, as administrator of the estate of Harvey Penn, deceased, against the Bates & Rogers Construction Company, to recover damages for the wrongful death of plaintiff's intestate. From a judgment sustaining a demurrer to and dismissing the petition, the plaintiff appeals. Affirmed.

H. W. Cole and A. D. Cole, both of Maysville, for appellant.

Stanley F. Reed, of Maysville, for appellee.

CLAY, C. William Penn, as administrator of Harvey Penn, brought this suit against the Bates & Rogers Construction Company, a corporation, to recover damages for his death. The petition alleged facts showing that the death of the deceased was caused by the gross negligence of the defendant, its agents and servants. The petition further alleged that the deceased had signed a contract, electing to receive benefits under the Workmen's Compensation Act (Laws 1914, c. 73), and that the defendant had also accepted the provisions of that act. A demurrer was sustained to the petition, and the petition dismissed. Plaintiff appeals.

Section 241 of the Constitution is as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person."

Plaintiff contends that this section of the Constitution gives to the administrator of an employee, whose death resulted from an injury inflicted by the negligence or wrongful act of another, an absolute right of action which the employee himself could not contract away by agreeing to accept, in lieu thereof, the benefits provided by the Workmen's Compensation Act. We do not deem it necessary to discuss the question further than to say that it was fully considered by the court in the case of Kentucky State Journal Co. v. Workmen's Compensation Board,

* Decision rendered, Jan. 28, 1919. Rehearing denied March 25, 1919. 209 S. W. Rep. 513.

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162 Ky. 387, 172 S. W. 674, L. R. A. 1916A, 402, where, in response to the petition for a rehearing we delivered an extended opinion, stating our conclusions in the following language:

"Second. Any employee, coming within the provisions of the act may voluntarily agree to accept its provisions fixing and limiting his recovery in case of injury.

"Third. He may likewise voluntarily accept the provisions of the act, fixing the amount that shall be recovered in the event of his death, and said sum should be paid to his dependents if he leaves any, and, if not, to his personal representative."

Since the deceased had the power, by voluntary contract, to accept the provisions of the act, fixing the amount that should be recovered in the event of his death, and since the compensation for death provided by the act is in lieu of all other liability, it necessarily follows that the act controls, and that an action for damages will not lie. Hence the demurrer to the petition was properly sustained.

Judgment affirmed.

SUPREME JUDICIAL COURT OF MAINE

IN RE MERCHANT'S CASE.*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"LOSS" OF FINGERS.

A painter, who, through laceration of left hand, affecting extensor muscles controlling third and fourth fingers, practically lost use of fingers, though his earning capacity was not diminished, did not "lose" the fingers within the Workmen's Compensation Act, § 16, and was entitled to compensation only under section 15, basis being difference in earning capacities before and after accident; "loss" meaning physical loss of a member.

(For other cases, see Master and Servant, Dec. Dig. § 385[4].)

(For other definitions, see Words and Phrases, First and Second Series, Loss.)

Appeal from Supreme Judcial Court, Franklin County, in Equity.

Proceedings for compensation under the Workmen's Compensation Act by Clarence N. Merchant, employee, opposed by the Maine & New Hampshire Granite Corporation, employer. Compensation was denied and the employee appeals. Appeal dismissed.

Argued before Cornish, C. J., and Spear, Hanson, Philbrook, Wilson, and Deasy, JJ.

Sumner P. Mills, of Farmington, for appellant.

L. E. Henry, and C. P. Conners, of Bangor, for respondents.

CORNISH, C. J. This claimant under the Workmen's Compensation Act was an employee of the Maine & New Hampshire Granite Corporation, and met with an accident on November 21, 1917. The injury

* Decision rendered, April 8, 1919. 106 Atl. Rep. 117.

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consisted of a laceration of the back of the left hand, which affected the extensor muscles controlling the third and fourth fingers; the third finger being drawn toward the palm of the hand at an angle of about 45 degrees, and the fourth finger at an angle of about 90 degrees. These two fingers were thereby rendered practically useless.

It is agreed that the injury arose out of and in the course of the employment and that the earning capacity of the claimant, who is a painter, has not been diminished by the accident.

The real and only issue is whether the claimant has "lost" these two fingers within the contemplation of R. S. c. 50, § 16, and should receive the compensation specified therein, to wit:

"For the loss of the third finger, one-half the average weekly wages during eighteen weeks. For the loss of the fourth finger, * * * one-half the average weekly wages during fifteen weeks"

—or whether he has suffered a partial disability and should be compensated as provided in section 15; the basis of compensation being the difference in his earning capacity before and after the accident.

The claimant contends for the former construction, and urges that the loss of the use of the third and fourth fingers must be construed as a loss of those fingers which entitle him to the specified amounts, without regard to the question whether his earning capacity has or has not been lessened.

The chairman of the Industrial Commission overruled this contention, and fixed the amount of damages under section 15. The correctness of this ruling is before this court in proper proceedings so far as the record shows, and we think it must be sustained.

[1] This question is one solely of statutory construction, and in construing this statute the words are to be interpreted in the sense in which they are commonly understood, "according to the common meaning of the language," R. S. c. 1, § 6, par. 1, taking into consideration the context and the subject-matter relative to which they are employed. Let us apply this familiar rule.

[2] Apart from the context of the statute, the "loss" of a member in the ordinary acceptation of the term implies a physical separation. To lose, in its primary sense, is "to part from or be separated from." Standard Dic. When in ordinary conversation it is said that one has lost his hand or his arm or his leg, nothing else is understood than an actual severance. It is true that for the sufferer the loss of the use of a member may be equivalent to the loss of the member itself so long as the disuse remains, but the two things are quite distinct, and if one has lost the use of a member it would be so described, and never as the loss of the member. "It may be that the disability would be as great as though the hand or foot was gone, but courts have no authority to extend the terms of the law beyond its plain provisions." Bigham v. Clubb, 42 Tex. Civ. App. 312, 95 S. W. 675, a case involving exemption from the payment of a poll tax because of the "loss" of a hand or foot.

Analyzing the statute under consideration, we find that the common meaning of the language is preserved. Section 14 of R. S. c. 50, covers compensation for total disability, that is, while the actual incapacity for work is total and prescribes the method of computation. There is added a petition as to what might be termed, presumptive total incapacity:

"In the following cases it shall, for the purposes of this act, be conclusively presumed that the injury resulted in permanent total disability, to wit: The total and irrevocable loss of sight in both eyes, the loss of both feet at or above the ankle, the loss of both hands at or above the wrist, the loss of one hand and one foot, an injury to the spine resulting in permanent and complete paralysis of the legs or arms," etc.

This language is most significant as distinguishing sharply between loss and loss of use and as specifying the one or the other according as

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the one or the other is intended. Thus the first clause does not say the loss of both eyes, which would mean removal, but the total and irrevocable loss of sight in both eyes, which is but another expression for total loss of use. The loss of the eye is one thing, the loss of sight, which means the loss of the use of the eye, is another. The second clause provides for the loss of both feet at or above the ankle. This admits of no other construction than an amputation at or above a certain point. So of the next clause, "the loss of one hand at or above the wrist"; while the last clause, "an injury to the spine resulting in permanent and complete paralysis of the legs or arms, * * * again recognizes the loss of use as distinguishcd from actual loss. Otherwise it might simply have read the loss of the legs or the arms.

Section 15 provides for compensation in case of partial disability. In section 16, under which the plaintiff claims the word "loss" is used in the same sense as in section 14, and, as there, is equivalent to severance or amputation. It is entitled "schedule of accidents provided for," and again certain accidents are arbitrarily specified as entitling the injured party to a certain fixed sum during a certain fixed number of weeks, and are deemed to create a total disability for the period specified, whether they do in fact or not. They are injuries of such a nature that they are made to automatically carry with them certain fixed amounts for a stated period, viz, "For the loss of a thumb, one-half the * * * weekly wages during fifty weeks," and then follow the amounts for loss of the first finger, the second finger, the first toe and second toe, etc.

It would be presumed that the word "loss" should have the same meaning in this section as in section 14, as they are parts of the same act, were there no internal and independent evidence to confirm it. But such evidence exists. For instance, not only are there provisions for loss of a thumb, of a finger and of a toe, but also for the loss of the first phalange of a thumb, of a finger or of a toe which shall be considered as a loss of one-half of such thumb, finger or toe, while the loss of more than one phalange shall be considered the loss of the entire thumb or finger or toe. This, as phrased, must contemplate severance.

Here, too, as in section 14, the idea of severance is apparent from the several clauses concerning the loss of an arm or any part above the wrist, for the loss of a leg or any part above the ankle, etc.

And in the last clause the distinction is again clearly made when it specifies that "for the loss of an eye, or the reduction of the sight of an eye, * * * to one-tenth of the normal vision," one-half the average wages for 100 weeks shall be awarded. Were there no difference between loss and loss of use, there was no need of this careful phrasing

Throughout these sections when loss of use without removal or severance is contemplated, it is so stated in unambiguous words, and when "loss" is used it means loss in the ordinary acceptation of the term; that is, the physical loss of a member.

It may well be that in fixing an arbitrary compensation for the loss of these various parts the Legislature purposely refrained from extending these provisions to loss of use in all but the two excepted instances before referred to, for the reason that a use which might be deemed loss at the beginning might be regained in whole or in part long before the expiration of the arbitrarily fixed period, while the loss by severance is irreparable. Some uncertainly might exist with regard to the one, none in regard to the other.

Our attention has been called by the claimant to various cases where a loss of use has been deemed equivalent to loss. These cases, however, arose under certificates issued by fraternal beneficiary societies, or policies of insurance issued by health or accident associations and the plaintiff's rights were based upon the language of the particular contracts. Such contracts are always held to be construed in favor of the insured.

No case has been cited to us, nor have we found any arising under

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the Workmen's Compensation Act which holds that the "loss of use" should be given the full effect of "loss."

On the other hand, there is approved authority sustaining our conclusion under Workmen's Compensation Acts. Packer v. Olds Motor Works, 195 Mich. 497, 162 N. W. 80; Adomites v. Royal Furniture Co., 196 Mich. 498, 162 N. W. 965; Northwestern Fuel Co. v. Industrial Commission, 161 Wis. 450, 152 N. W. 856, Ann. Cas. 1918A, 533, and extended note, the introduction of which is as follows:

"The general rule deducible from the cases cited throughout this note is that unless a Workmen's Compensation Act provides that when a member is so impaired as to be permanently incapable of use compensation shall be awarded as for the 'loss' thereof, 'loss' of a member is construed to mean loss by severance only."

See, also, the definitions in Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397.

Our conclusion, therefore, is that the ruling of the chairman of the Industrial Commission was without error and the entry must be:

Appeal dismissed.

COURT OF APPEALS OF MARYLAND.

GRANT ET AL.

v.

KOTWALL. (No. 87.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PARTIAL DEPENDENCY OF MOTHER.

Evidence that deceased employee paid mother $8 a week when working, which enabled her to run household, consisting of herself, her husband, the son, a daughter, and other children, more easily than after she was deprived of son's contribution, held legally sufficient to show that mother was partially dependent on son within Workmen's Compensation Act, though her husband was alive and not incapacitated.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from Superior Court of Baltimore City; John J. Dobler, Judge.

Proceedings under the Workmen's Compensation Act for compensation for the death of August Kotwall, the employee, by Anna Kotwall, his dependent mother, against Charles E. Grant, the employer, and the Maryland Casualty Company, the insurer. From an order of the superior court of Baltimore city reversing an order of the State Industrial Accident Commission disallowing compensation, the employer and insurer appeal. Order affirmed.

Argued before Boyd, C. J., and Briscoe, Burke, Thomas, Pattison, Urner, and Constable, JJ.

A. J. Lily and Walter L. Clark, both of Baltimore, for appellants.

*Decision rendered, Jan. 15, 1919. 105 Atl. Rep. 758.

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Edw. J. Colgan, Jr., of Baltimore (Frank J. Pintner, of Baltimore, on the brief), for appellee.

BURKE, J. This a workmen's compensation case, and is before us upon an appeal by the employer and the insurer from an order of the superior court of Baltimore city reversing an order of the state Industrial Accident Commission, which disallowed compensation to the claimant, and remanding the cause to that commission.

Augustus Kotwall, the deceased, was an unmarried man, and his trade was that of a painter. On the 9th day of May, 1916, he was working as a painter for Charles W. Grant. He died on May 9, 1916, as a result of an injury sustained that day in the course of his employment. His father, John Kotwall, filed a claim for compensation upon the ground of dependency, and after a hearing before the commission the claim was refused. Subsequently, Anna Kotwall, the mother of the deceased, filed a claim for compensation. A hearing was had upon this application, and on the 3d day of November, 1916, the state Industrial Accident Commission passed an order disallowing the claim, upon the finding that "the claimant in this case was not wholly, nor partially, nor in any wise dependent upon the deceased, and she is therefore not entitled to compensation arising out of the death of Augustus Kotwall." From this order an appeal was taken, and the case was heard by the court, without a jury, upon the transcript of the proceedings and evidence taken before commission upon both applications.

At the hearing in the lower court the claimant offered one prayer, and the employer and insurer four. The court granted the claimant's prayer, and also granted the second, third, and fourth prayers of the employer and insurer, but refused their first.

The granted and refused prayers are here inserted:

Claimant's prayer: "The appellant prays the court that if it should find as a matter of fact that Annie Kotwall was partially dependent upon Augustus Kotwall for maintenance and support at the time of said Augustus Kotwall's death, then to rule as a matter of law that she is entitled to compensation therefor."

Employer's and insurer's prayer: "The employer and insurer pray the court to rule as a matter of law that there is no evidence in this case legally sufficient to show that claimant was dependent upon her deceased son, Augustus Kotwall, for support at the time of his death, May 9, 1916."

There is only one exception in the record, and that was taken to the granting of the claimant's prayer, and to the rejection of the employer's and insurer's prayer. It is not claimed that the mother was wholly dependent upon her deceased son, but it is insisted that she was partially dependent upon him.

There is no definition of dependency contained in the Workmen's Compensation Act of this state (Code Pub. Civ. Laws, art. 101), but it is provided that certain enumerated classes shall be presumed to be wholly dependent. The claimant is not one of that class. But it is provided by section 36, art. 101, Code, vol. 3, that:

"In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in death of such employee."

The question to be decided is this: Is there evidence in the record legally sufficient to show that the claimant was partially dependent upon her deceased son within the meaning of the Workmen's Compensation Act? On some few points the evidence of the claimant and her husband is in sharp conflict, but on the legal question presented by the record it is not our province to determine the credibility of the evidence of these witnesses on controverted questions of fact. The following facts appear to be established by satisfactory evidence: The family of John Kotwall,

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the father, consisted of his wife, the claimant, and four children, two sons and two daughters. One daughter was living in Detroit, Mich., and was earning her own livelihood. The other three children lived at home. For about five years prior to Augustus Kotwall's death, John Kotwall and his two sons each gave the mother $8 per week, with which she maintained the home and paid all the household expenses. For about three months during the winter the deceased son could not work, and during that time he did not make the weekly payment to his mother, but when he did go to work he paid her the amount of the arrearages. The amount paid was more than sufficient for his board and lodging. John Kotwall was in receipt of $64 per month from the government of the United States, and at the time of his son's death was employed by the Adjutant General of Maryland in a clerical position, and received $40 or $50 per month. A few weeks after the death of his son he retired from his position, and had no regular business or occupation until 1918, when he returned to his former employment, but what he is receiving now does not appear from the evidence. John Kotwall owns the house he lives in, which is valued at $1,650, and is subject to a ground rent of $45 per year. He pays the ground rent, taxes, insurance, and furnishes the coal, but refused to pay his wife more than $8 per week for household expenses, saying that the children were contributing. He took the position that the sons must contribute each one-third of the expenses, which they did. The claimant in her examination in chief testified as follows:

"I am the mother of Augustus Kotwall. My husband and three children are now living. My son died May 9, 1916, while in the employ of Charles W. Grant. He was earning $15 a week at the time of his death, or $2.50 a day. I was dependent upon him for my livlihood—for my support and keeping; dependent on him every week. He paid me $8 every week he worked. Q. Did he give you this $8 every week? A. Every week he worked; yes sir. In addition to the $8 which he gave me every week, at times when I needed it he would give me almost all his pay. Quite often I needed more in case of sickness or doctor's bills for myself. I had to fall back on my children. He would help me with more money. He was 24 years old, single, and lived with me."

And on cross-examination she said:

"My son had worked seven years altogether. He had been paying me $8 a week for five years previous to his death. I have missed his income a great deal. For one thing I am not able to buy things for myself as I would if I had been getting his money. I depended on his paying for clothing and things that I cannot possibly get now. Houses in my neighborhood rent for $16 a month. I employ no servant but my daughter. She did the work for me, and I paid her the same as a servant—$3 a week. I have not been able to pay her since my son's death. She is working for me now as she did before, but I do not pay her. I give her her board and purchase her clothing for her when I can. Her father does not contribute anything for her board, nor for her clothing. I have to keep her."

She further said that her husband contributes nothing for her clothing.

In re Carrroll, 116 N. E. 844, the court said:

"Stated generally, a dependent is one who looks to another for support and maintenance; one who is in fact dependent—one who relies on another for the reasonable necessities of life."

See, also, Parson v. Murphy, 101 Neb. 542, 163 N. W. 847, L. R. A. 1918F, 479.

In Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A, 436, where an employee left surviving him two sisters under 18 years of age and a mother to whom he gave $20 per month, which the mother used for her support and that of her minor children,

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a finding by the Compensation Commission that she was partially dependent upon him was sustained, although the mother received other support from her husband, who earned $50 per month. In Conners v. Public Service Commission, 89 N. J. Law, 99, 97 Atl. 792, the court said:

"The deceased was over age, and therefore entitled to his own wages; that as a voluntary matter he turned his wages into the family fund, and there was evidence justifying a finding that the sister, whether an adult or a minor, received substantial benefit therefrom, of which she has been deprived since his death. This in turn justified a finding that she was an actual dependent. We do not understand the decision of the Court of Errors in the Havey Case to mean that a minor sister cannot be classed as a dependent of a deceased adult brother because she has a father who is under obligation to support her. Such a ruling would shut out the minor brothers and sisters in a case, for example, where the father was incapacitated and earned nothing, and the adult brother was the sole support of the family. So, also, if she was of age, her actual dependency is a pure question of fact, to be determined by the test laid down by the opinion of this court in the case of Hammill v. Penna. R. R. Co., 87 N. J. Law, 388, 94 Atl. 313, adopted in the Court of Errors and Appeals [88 N. J. Law, 717], 96 Atl. 292, viz.: 'We understand the phrases "actual dependents" and "who are dependent upon the deceased," as used in paragraph 12 of the act as amended, * * * to mean relatives in some degree mentioned in that paragraph, who were being wholly or to a substantial degree supported by the deceased at the time of his death'."

The evidence in this case is, we think, sufficient to show, or at least legally tended to show, that the claimant, under the principles announced in the cases cited, and which are in accord with those announced in many other cases, was partially dependent upon her deceased son, and therefore the court committed no error in rejecting the employer's and insurer's first prayer, and in reversing the order appealed from, and remanding the cause to the commission.

Order affirmed, with costs.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Essex.

In re PASS' CASE.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL—QUESTIONS OF FACT.

Whether injured employee proceeding for compensation under Workmen's Compensation Act gave notice required by act, whether insurance association, the subscribers, or their agent had notice of the injury, whether the claim had not been filed as required, whether failure to file it was due to mistake or other reasonable cause, and whether employee had received injury arising out of and in course of employment were questions of fact, as to which appeal will not lie.

(For other cases, see Master and Servant, Dec. Dig. § 417[3¼].)

*Decision rendered, April 1, 1919. 122 N. E. Rep. 642.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF INDUSTRIAL BOARD—REVIEW.

Under the Workmen's Compensation Act, the findings of fact of the Industrial Accident Board stand if there is any evidence to support them.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INDUSTRIAL BOARD — REFUSAL TO CREDIT EVIDENCE.

Industrial Accident Board hearing a workmen's Compensation case was at liberty, so far as review is concerned to refuse to give credit to any part of the evidence not, in their opinion, entitled to credit.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Essex County.

Proceedings for compensation for injuries under the Workmen's Compensation Act by Duncan Pass, employee, opposed by the General Electric Company, employer, and the Liberty Mutual Insurance Company, insurer. Compensation was denied, the denial affirmed by the superior court, and from its decree the employee appeals. Decree affirmed.

A. B. Tolman, of Lynn, for appellant.

John W. Cronin and Frederick A. Carroll, both of Boston, for insurer.

PER CURIAM. This case comes before us by appeal from an adverse decision by the industrial accident board, which adopted and confirmed the finding of the single member. The finding was (1) that the statutory notice required by the act had not been given, (2) that it had not been shown that either the association, the subscribers or their agent had notice of the injury, (3) that the claim for compensation had not been filed as required by the act, (4) that the failure to file the claim was not due to mistake or other reasonable cause, and (5) that the employee had failed to prove that he received a personal injury which arose out of and in the course of his employment. Any one of these findings is fatal to the employee's contentions.

[1, 2] These all were questions of fact. No law is involved. It has been held from the very first under the Workmen's Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571) that the findings of fact of the industrial accident board stand if there is any evidence to support them. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737.

It is as futile for parties to appeal from a decision of the board on questions of fact as it would be to except to an adverse verdict of a jury or an unfavorable finding by a judge.

[3] It is enough to say that the board was at liberty to refuse to give credit to any part of the evidence not in their opinion entitled to credit. The case is within the authority of numerous recent decisions. Fitzgibbons' Case, 230 Mass. 473, 119 N. E. 1020; Moran's Case, 230 Mass. 500, 119 N. E. 956; Knight's Case, 231 Mass. 142, 120 N. E. 395; McCarthy's Case, 231 Mass. 259, 120 N. E. 852; Berman's Case, 232 Mass.—, 122 N. E. 395.

Decree affirmed.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

CENTRELLO'S CASE.

IN RE J. K. RYAN CO.

IN RE TRAVELERS' INS. CO.*

1. MASTER AND SERVANT—LETTING TEAMS WITH DRIVERS —EFFECT ON GENERAL EMPLOYMENT.

Driver of team hired out by owner, his general employer, to work for another, remains in employ of general employer, so far as concerns management and care of horses.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY TO INDEPENDENT CONTRACTOR.

Owner of teams and horses, who let them with drivers, to company at rate per hour, paying drivers and driving team himself, who was injured in management of horses of his team, *held* not entitled to compensation from company or insurer under Workmen's Compensation Act, pt. 3, § 17, as to employees of independent contractors.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Appeal from Superior Court, Suffolk County.

Proceeding for compensation for injuries under the Workmen's Compensation Act by Louis Centrello, the employee, opposed by J. K. Ryan, the employer, and the Travelers' Insurance Company. Compensation was awarded, the award affirmed by the superior court, and from its decree the insurer appeals. Reversed.

Walter I. Badger and Louis C. Doyle, both of Boston, for appellant.

PER CURIAM. [1] Centrello owned three teams which he let with drivers to the J. K. Ryan Company to haul dirt at the rate of $1 per hour for each team and driver. Centrello drove one of the teams himself. At the end of a day's work Centrello got off his cart and went in front, thinking it would be safer to lead the horses down an embankment. He took hold of the horses by the bridle and led them. While doing this his leg was broken by a rolling stone. The J. K. Ryan Company directed the general work of hauling the dirt. The drivers did no work of shoveling or loading and only drove the horses and took the pin out of the cart when it had been driven to the place to dump and replaced it after the cart had been dumped. The Ryan Company did not fix the wages of the drivers. That was done by Centrello. He received no wages himself. He made the profits due to the owner and contractor for letting the teams with drivers. Neither he nor his drivers were on the pay roll of the Ryan Company. There is no evidence that the Ryan Company exercised any control over the drivers respecting their horses, except to direct them where to get dirt and where to dump it. The statement of a foreman of the Ryan Company to the effect that

* Decision rendered, March 14, 1910 122 N. E. Rep. 560.

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"If a driver didn't do what I wanted him to, I would tell him to take his team and go," adds nothing to his testimony that "other than to tell Centrello where to get dirt and where they should dump it, he did not give them any orders." Where nothing further appears, it is plain that the driver of a team hired out by the owner, his general employer, to perform work for another, remains in the employ of his general employer so far as concerns the management and care of his horses. Peach v. Bruno, 224 Mass. 447, 113 N. E. 279. Centrello was not an employee of the Ryan Company in this respect. Since there is nothing to show that the care and management of the horses were surrendered to the Ryan Company the drivers were not employees of that company, but of the owner of the horses and teams. Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648, and numerous cases there collected. Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694, has no pertinency under these conditions. The circumstance that Centrello was the owner and drove one of his own teams does not establish the liability of the Ryan Company. He stands in this regard no better than one of his hired drivers. He was working for himself respecting the care and particular management of the horses. He received his injury in connection with that work. The case is governed by the principle stated in numerous cases. Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Cain v. Hugh Nawn Contracting Co., 202 Mass. 237, 239, 88 N. E. 842; Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Comerford's Case, 224 Mass. 571, 113 N. E. 460; Clancy's Case, 228 Mass. 316, 117 N. E. 347; Scribner's Case, 231 Mass. 132, 120 N. E. 350; Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

[2] Upon the facts found Centrello was not entitled to recover under part 3, § 17, of the Workmen's Compensation Act (St. 1911, c. 751). It is plain that he was an independent contractor. If other elements are made out, the general employer is liable to pay to employees of an independent contractor "any compensation which would be payable to them under this act if the independent or subcontractors were subscribers." These words afford compensation only to the employees of the independent contractor and not to the independent contractor personally. Cashman's Case, 230 Mass. 600, 120 N. E. 78.

Decree reversed.

Decree to be entered in favor of insurer.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

WINSLOW'S CASE.

IN RE TOWN OF MANSFIELD.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"INDEPENDENT CONTRACTOR" WITH TOWN—RIGHT TO COMPENSATION—STATUTE.

Claimant for compensation for injuries from town, who, engaged in business of stable keeping, teaming, and jobbing, let to town for work on

* Decision rendered, March 14, 1919. 122 N. E. Rep. 561.

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its roads a cart, pair of horses, and himself for undivided price of $6 a day, *held* an "independent contractor," not entitled to compensation for injuries while driving, under St. 1913, c. 807, § 1, amending the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.)

Appeal from Superior Court, Suffolk County.

Proceeding for compensation for injury under the Workmen's Compensation Act by George Winslow, the employee, opposed by the Town of Mansfield, the employer and self-insurer. Compensation was awarded, the award affirmed by the Superior Court, and the employer and insurer appeals. Decree of the superior court reversed, and decree directed to be entered in favor of employer and insurer.

Henry F. Wood, of Boston, for appellant.
John R. Halliday, of Mansfield, for employee.

PER CURIAM. The claimant was engaged in the business of stable keeper, teaming and jobbing. He let, to work for the town on its roads, a cart, pair of horses and himself as driver for the single and undivided price of $6 per day. His work was principally driving, but as occasion required he got off and shoveled and raked. The matter of handling the horses was left entirely to him and he managed them in his own way. He had used a cart of his own most of the time, but on the day of his accident he furnished a cart which he did not own. The accident occurred while he was driving off the road to dump his cart and was caused by the giving way of the king bolt. The town was liable under St. 1913, c. 807, § 1, for injuries received by "such laborers, workmen and mechanics employed by it as receive injuries arising out of and in the course of their employment," in general according to the provisions of the Workmen's Compensation Act (St. 1911, c. 751).

The facts show plainly that the claimant was an independent contractor. He furnished the team and driver for one price. The duty of the care and management of the horses and cart rested upon him as such contractor. His injury occurred in connection with the performance of that duty. The case is covered in principle in every particular by Centrello's Case, 122 N. E. 560, just decided.

It follows that the claimant does not come within the terms of St. 1913, c. 807, § 1, on which alone liability of the town can be based.

Decree reversed.

Decree to be entered in favor of town.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

KEOHANE'S CASE.

IN RE McCARTHY.

IN RE MASSACHUSETTS BONDING & INS. CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MOTION FOR PERMISSION TO FILE LATE CLAIM FOR REVIEW.

Where insurer failed, within seven days after decision of committee of arbitration was filed, to file a claim for review as required by Workmen's Compensation Act, pt. 3, § 7, as amended by St. 1912, c. 571, § 12, as amended, industrial accident board had no authority to grant insurer's motion for permission to file late its claim for review.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL TO SUPREME JUDICIAL COURT—FINAL DECREE.

Workmen's Compensation Act requires a final decree of the superior court from which the party aggrieved can appeal to the Supreme Judicial Court.

(For other cases. see Master and Servant, Dec. Dig. § 418[2].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MANDATORY ORDER OF SUPERIOR COURT — INTERLOCUTORY CHARACTER.

Mandatory order of superior court that proceedings for compensation for death of employee be remitted to industrial accident board for entrance of finding that board had no jurisdiction, and for dismissal of claim, *held* not contemplated by Workmen's Compensation Act, and to be treated as interlocutory, and not as a final order, from which employee's administratrix could appeal.

(For other cases. see Master and Servant, Dec. Dig. § 418[2].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL TO SUPREME JUDICIAL COURT.

Where superior court ordered that claim for compensation be remitted to industrial accident board for finding, board had no jurisdiction, and board so found and dismissed claim, and superior court entered final decree affirming board's decision, under Workmen's Compensation Act, pt. 3, § 11, case is properly before Supreme Judicial Court on employee's administratrix's appeal from such decree of superior court.

(For other cases. see Master and Servant, Dec. Dig. § 418[2].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT OF EXECUTOR.

Under Workmen's Compensation Act, pt. 5 § 2, cl. 1, administrator or executor, if an employer of labor, may become a subscriber, instead of

*Decision rendered, March 27, 1919. 122 N. E. Rep. 573.

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remaining under the common law subject to the disadvantages imposed by the statute.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Superior Court, Suffolk County; William Cushing Wait, Judge.

Proceedings for compensation under the Workmen's Compensation Act by Julia Keohane, administratrix of the estate of John Keohane, the employee, opposed by Timothy J. McCarthy, Ellen A. McCarthy being substituted as his administratrix, the employer, and the Massachustts Bonding & Insurance Company, the insurer. Claim for compensation was dismissed by the industrial accident board, the board's order was affirmed by the superior court and from its decree the administratrix of the estate of the deceased employee appeals. Decree affirmed.

John J. O'Hare and C. J. Muldoon, Jr., both of Boston, for appellant.

Gaston, Snow & Slatonstall, of Boston (Rupert L. Mapplebeck, of Boston, of counsel), for appellee.

BRALEY, J. [1, 2] The intestate, John J. Keohane, a teamster, had been in the employ of one Timothy J. McCarthy to whom under St. 1911, c. 751, as amended, the insurer issued a policy dated March 3, 1916, to run for one year, protecting him as a subscriber from liability on account of injuries or death sustained by his employees. But McCarthy having died testate June 15, 1916, his executrix without being empowered by will, or authorized by decree of the court of probate, continued after his death in the business for the benefit of the estate and retained Keohane as an employee. See St. 1910, c. 411, § 1; Hines v. Levers & Sargent Co., 226 Mass. 214, 115 N. E. 252. The committee on arbitration found that on August 14, 1916, Keohane received a personal injury in the course of and arising out of his employment, "by being thrown from and run over by the team which he was employed to drive, and that he died on the same day as a result of the injury," and ordered the insurer to pay compensation to the adminstratrix in the amount stated in the record. St. 1911, c. 751, pt. 2, §§ 6, 13. The decision was filed October 9, 1917, and the insurer having failed within seven days thereafter to file a claim for review as required by St. 1911, c. 751, pt. 3, § 7, as amended (St. 1912, c. 571, § 12), the industrial accident board rightly decided on January 12, 1918, that it had no authority to grant the insurer's motion for permission "to file late its claim for review." The procedure thereafter was as follows: The insurer January 21, 1918, presented to the superior court certified copies of the decision of the industrial accident board and the findings of the committee on arbitration and of all papers in connection therewith, stating that it intended to appeal to this court from the decision of the board. The administratrix however could not enforce the decision of the committee on arbitration except by a decree of the superior court and it is to be inferred, although the record does not so state specifically, that she presented and asked for the entry of the decree recited in the record. But the presiding judge on February 11, 1918, made an order on the above decree that—

"After hearing I am satisfied that no contract of insurance existed at the time of the injury; that in consequence there was no jurisdiction in the accident board and the motion for decree is denied."

The administratrix March 1, 1918, appealed to this court from the order. The case thereafter was remitted to the industrial accident board under an order the material recitals of which are as follows:

"And now comes the Massachusetts Bonding & Insurance Company an alleged insurer in the above-entitled matter and moves that the matter be dismissed for want of jurisdiction of the same by the industrial ac-

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cident board * * * and a decree was presented to the court upon which the following order was made, to wit: After hearing I am satisfied that no contract of insurance existed at the time of the injury. That in consequence there is no jurisdiction in the accident board and the motion for decree is denied. * * * And on the 15th day of said February, 1918, after due hearing the court ordered that said cause be remitted to the industrial accident board for the entrance of a finding that the board had no jurisdiction in the matter and the dismissal of the claim."

While the question whether the case presented by the record was as matter of law within the statute was before the court the procedure adopted was irregular. The statute requires a final decree from which the party aggrieved can appeal to this court. Gould's Case, 215 Mass. 480, 483, 102 N. E. 639, Ann. Cas. 1914D, 372; Pigeon's Case, 216 Mass. 51, 54, 55, 102 N. E. 932, Ann. Cas. 1915A, 737; Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Cowden's Case, 225 Mass. 66, 68, 113 N. E. 1036; Humphrey's Case, 226 Mass. 143, 115 N. E. 253; Brown's Case, 228 Mass. 31, 38, 116 N. E. 897; Dempsey's Case, 230 Mass. 583, 120 N. E. 75.

[3-6] A mandatory order in the form shown by the record is not contemplated by the statute and a decree should have been entered dismissing the claim for reasons subsequently stated. Brown's Case supra. See Pattee v. Stetson, 170 Mass. 93, 95, 48 N. E. 1022. It is plain notwithstanding the insurer's contention to the contrary, that the order should be treated as interlocutory and there was no final decree from which the administratrix could appeal. The board upon receiving the order March 11, 1918, decided April 12, 1918, that—

"In accordance with the order of the superior court, the industrial accident board finds that they have not jurisdiction of the matter and dismiss the claim for compensation."

The case thereupon again came before the superior court and a final decree having been entered affirming the decision the case is properly before us on her appeal. St. 1911, c. 751, pt. 3, § 11; Gould's Case, supra. The decree must be affirmed. The contract of insurance was solely between the testator and the insurer. The company undertook by the terms of the policy to indemnify him personally as a subscriber, and even if he died during the year the policy cannot be extended to include claims for injuries suffered by the employee's of the executrix who is an employer of labor in the business, which she is personally conducting. People's Ice Co. v. Employers' Liability Assurance Corp., 161 Mass. 122, 36 N. E. 754; Imperial Fire Ins. Co. of London v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231. The administratrix however contends that under St. 1911, c. 751, pt. 5, § 2, cl. 1, which says that "employer" shall include the legal representative of a deceased employer, the executirx being the legal representative of the testator is covered by the policy. But the preceding words of this section are, that the following words and phrases as used in this act shall unless a different meaning is plainly required by the context have the meaning we have just quoted. The definition simply means, that in the construction of the act, an administrator or an executor if an employer of labor, may become a subscriber, instead of remaining under the common law, subject to the disadvantages imposed by the statute.

Decree affirmed.

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SUPREME COURT OF MICHIGAN.

BORCK

v.

SIMON J. MURPHY CO. (No. 1.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY IN COURSE OF EMPLOYMENT—QUESTION OF LAW OR FACT.

The question whether a workman is injured by an accident arising out of and in the course of his employment entitling him to compensation under the Workmen's Compensation Act may be a question of law, or one primarily of fact, or a mixed question of law and fact.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY NOT IN COURSE OF EMPLOYMENT—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain finding of Industrial Accident Board that injured employee, watchman at one building, had gone to another building of his employer, where he was injured by falling down the elevator shaft, on business of his own, not that of his employer, so that he was not injured by accident arising out of and in course of employment entitling him to compensation under Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Industrial Accident Board.

Proceedings for compensation for injuries under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) by Otto C. Borck, the employee, opposed by the Simon J. Murphy Company, the employer. Compensation was denied by the Industrial Accident Board, and the employee brings certiorari. Affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ

Carl B. Grawn, of Detroit, for appellant.

Keena, Lightner, Oxtoby & Hanley, of Detroit, for appellee.

OSTRANDER, J. The respondent owns several buildings in Detroit, among them the Telegraph building, on the southeast corner of the intersection of Congress and Shelby streets, and the Marquette building on the southeast corner of Congress and Wayne streets—one block east of the Telegraph building. Claimant was employed by the respondent during the week as janitor of the Telegraph building, and on one Sunday in each month as watchman of the same building. He seems to have acted, too, during the week, more or less, as an utility man doing errands, etc., when directed to do so. On these Sundays when he was watchman he swept the hall of the building, a performance which occupied very little time. He was paid by the month. He was on duty as watchman on Sunday, July 29, 1917. Some time in the morning he left the Telegraph building and went to the Marquette building and into it, and was injured

* Decision rendered, April 3, 1919. 171 N. W. 470.

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by falling into an elevator shaft. An arbitration committee found that the accident did not arise out of or in the course of the employment. The board in its opinion said:

"Without discussing the testimony, which is very long, the board finds:

"(a) That the applicant, at the time he fell down the elevator shaft in the Marquette building, was not at said building on any business of his employer, but that he was there entirely upon his own initiative, and evidently because he had no special work to do or thought he had no special work to do in the Telegraph building, where he was working, and idly went over to the Marquette building through some idea of his own.

"(b) That at the time he suffered the accidental, personal injury which he did suffer, he was not in the course of his employment, and that the accident did not arise out of or in the course of the employment of the applicant."

The claimant, plaintiff in certiorari, says:

"The only question at issue is as to whether or not the applicant received a personal injury 'arising out of and in the course of his employment, under part 2, § 1, of the act. This is, of course, a question of law, and cannot be foreclosed by the Industrial Accident Board's ruling, which was adverse to applicant.

"The Industrial Accident Board came to its conclusion, naturally by a review of the testimony, and it is clearly within the province of this court to review the testimony in this cause to ascertain: (1) Whether or not the evidence supports the legal conclusions of the board drawn therefrom, and (2) whether or not there is any evidence in the case to support the legal conclusion of the board.

"In this particular case, to justify a reversal, we do not deem it necessary for the court to find that there is no evidence supporting the conclusion of the board, although we believe such to be the situation, as will be hereinafter pointed out."

[1] The question whether a workman is injured by an accident arising out of and in the course of his employment may be a question of law, or one primarily of fact, or a mixed question of law and fact. In this case, if the finding (a) of the board, which fairly negatives the idea that claimant was doing anything in the course of his employment or anything in the interest of his employer's business or affairs when he was injured, and which fairly affirms the idea that he was neglecting his duties as watchman in being away from the Telegraph building, is supported by competent testimony, it is decisive of the question, and the conclusion (b) would follow as matter of course.

[2] It is evident that neither the committee nor the board believed the story told by claimant to the effect that a messenger from the Marquette building summoned him to go to that building upon the occasion in question. All the testimony introduced by claimant to establish the fact that, while acting as janitor, he was, upon various occasions, sent upon errands by his superior to different buildings belonging to respondent, goes for nothing if it is believed that no one summoned or directed him upon this occasion, but that he went to the Marquette building upon his own initiative to visit with the watchman in the Marquette building. There is abundant testimony supporting the conclusion of the committee and of the board, including testimony of the admissions of claimant contradictory of the testimony he gave in this investigation, and which negatives the idea that he was doing anything but going to the Marquette building to call upon or visit with William Cargill, the watchman at the Marquette building, who, it is alleged, had sent for him, and who denies that he sent for him. The testimony is positive and circumstantial, too, to the effect that claimant's duty while acting as watchman of the Telegraph building required him to stay in the building, not to leave it. There is no testimony which fairly tends to support the conclusion that

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the several buildings owned by respondent constituted one plant, and that the duties of claimant required or permitted him to go from one to the other except upon the direction of a superior.

The board having found controlling facts, and the finding being supported by competent testimony, the award must be affirmed, with costs to defendant in certiorari.

SUPREME COURT OF MICHIGAN.

McRAE

v.

MORGAN & WRIGHT. (No. 123.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT —DEATH OF SERVANT.

In a proceeding under the Workmen's Compensation Act, evidence *held* to warrant a finding that death arose out of and in course of employment, by reason of blood poisoning alleged to have been caused by a cut or scratch received by deceased while engaged in cleaning bull gear.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Industrial Accident Board.

Proceedings by Elizabeth McRae under the Workmen's Compensation Act (Pub. Acts Ex. Sess 1912, No. 10) to obtain compensation for the death of her husband, John McRae, opposed by Morgan & Wright, the employer. There was an award by the Industrial Accident Board, and the employer brings certiorari. Award affirmed.

Argued before Ostrander, C. J., and Bird, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Alexander & Cotter, of Detroit, for respondent.
Geo. M. Clark, of Bad Axe, for applicant and appellee.

BIRD, J. The claim of plaintiff is that her husband, John McRae, met with an accident while in defendant's employ, which subsequently caused his death. The Compensation Board made the usual death award, and defendant reviews the proceedings on the claim that the testimony does not show that McRae's injury arose out of and in the course of his employment.

The testimony discloses: That John McRae was an old employee of defendant, having been in its employ nearly five years. That on Sunday, April 21st, he, with another employee, August Small, was engaged in cleaning a bull gear in the room where the rubber was washed. To clean the gear it was necessary to remove a sheet iron cover which inclosed it. While doing so, it is claimed McRae's right hand was cut or scratched by the sharp edges of the cover. The witness Small testified that at about the time they finished removing the cover he noticed blood on McRae's hand, but did not remember which hand. After that they pro-

Decision rendered, April 3, 1919. 171 N. W. Rep. 394.

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ceeded to clean the gear. McRae went to work on Monday morning, but was obliged to leave before the working hours were over because of an intense headache. Tuesday morning he was unable to go to his work. His landlady testified that his hand was very badly swollen, and that he complained that it pained him. Later in the day, on Tuesday, he visited Dr. Ash, defendant's physician, and afterwards called upon Dr. Thomas, and to both he expressed the opinion that his hand was rheumatic. Tuesday evening he left Detroit for Harbor Beach, where he resided. Wednesday morning Dr. Armitage was called and found him suffering from septicemia. Red streaks were already running up his right arm. His temperature was 104. His right hand was very hot and badly swollen. The doctor testified these were symptoms of blood poisoning. The doctor also observed the scratch or abrasion between the second and third fingers of the right hand. Dr. Harrington, a surgeon from Bad Axe, was called in consultation, and he agreed with Dr. Armitage that McRae was suffering with septicemia. All their efforts to stay the action of the poison failed. His left hand and arm soon became affected, and later in the week his lower limbs and finally his entire body became involved. On Sunday morning, April 28th, he died.

Counsel contends that there is no evidence in the record from which the board could find that his hand was scratched or cut by the sharp edges of the steel cover. The witness Small testified that the edges of the cover were thin and sharp, and that on a prior occasion he had cut his hand in attempting to remove it, and further that at about the time they finished removing the cover he saw blood on McRae's hand and spoke to him about it. Jennings, a fellow employee, testified that on Monday he saw McRae picking a cut or abrasion on the back of his hand, near the center of his hand. Proof of the facts which we have narrated were sufficient to justify an inference that McRae's hand was cut or scratched in the manner claimed and that in cleaning the gear it became infected and resulted in speticemia or blood poisoning.

A great many question are raised and discussed by counsel which we think were entirely within the province of the board. It will suffice to say that the main facts narrated here were sufficient to bring the question of accident within the domain of fact and consequently within the jurisdiction of the board, and it was for them to weigh and decide upon the conflict in the testimony and to say what inferences should be drawn therefrom. With this view, it will be unnecessary for us to consider in detail the other questions which defendant's counsel have discussed.

The award is affirmed.

SUPREME COURT OF MICHIGAN.

CAMPBELL

v.

CUMMER-DIGGINS CO. (No. 23.)*

2. MASTER AND SERVANT—COMPENSATION FOR DEATH—EVIDENCE.

Where record indicated that evidence could be procured to show the average annual earning capacity of claimant's decedent or that of a

* Decision rendered, April 3, 1919. 171 N. W. Rep. 395.

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workman of the same class in the same locality, but claimant failed to make such proof, it was error to apply the 300-day rule, taking account only of the wages of claimant's decedent received at the time he was injured and for 6 weeks prior thereto, and the case would be remanded to supply the required proof.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Certiorari to Industrial Accident Board.

Claim under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10), by Jennie Campbell to recover compensation for death of her husband, Edward Campbell, employee, against the Cummer-Diggins Company. From an order of the Industrial Accident Board awarding compensation, respondent brings certiorari. Award set aside, and cause remanded.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Fred C. Wetmore, of Cadillac, for appellant.

Gaffney, Miltner & Millington, of Cadillac, for appellee.

OSTRANDER, J. The injury was received in November, 1916, and the claimant's decedent died as a result thereof. The parties agreed that compensation should be paid the claimant at the rate of $6.25 a week for 300 weeks. This agreement being submitted to the Industrial Accident Board, they declined to approve it. There was an arbitration, and an award of $7.93 per week was made. This award was affirmed by the full board. Whether it is the proper award is the only question involved. The board found:

"(A) That Edward Campbell, the deceased employee, was not working in the employment in which he was injured for practically or substantially the whole of the year immediately preceding his injury, and that the compensation in this case should not be computed under the first classification mentioned in the Andrejwski Case.

"(B) That Edward Campbell, the deceased employee, had not worked in the employment in which he was working at the time of the accident, either for the respondent employer or any other employer, during substantially the whole of the year immediately preceding his injury.

"(C) That during a substantial portion of the year immediately preceding the injury which caused the death of Edward Campbell he was working for himself, and that the record does not show what his earnings were when he worked for himself.

"(D) That this case is not a case in which none of the first three classifications mentioned in the Andrejwski Case can reasonably and fairly be applied, and that it does not fall within the fourth classification mentioned in said case.

"(E) That this case does fall within the so-called '300-day rule' contained in the statute prior to the amendment which took effect August 10, 1917, and that the proper method of arriving at compensation in this case is to multiply the daily wage by 300, divide that by 52 to get the average weekly wage, and then divide the average weekly wage by 2 to get the rate of compensation.

"(F) That the daily wage as agreed upon at the arbitration was $2.75, and that 300 times $2.75 is $825, and that one fifty-second of $825 is $15.86, which is the average weekly wage the injured employee was receiving at the time of his injury and death, and that one-half of that is the sum of $7.93, which is the proper compensation rate in this case."

It will be perceived that in applying the 300-day rule the board took no account of the average daily wage of the claimant's decedent, or of the average annual earnings of carpenters, but took account only of the

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wages he was receiving at the time he was injured, and for six weeks prior thereto, from the respondent. The record does not show any agreement at the arbitration, or elsewhere, as to the daily wage, except for the period named. It is undisputed that when he was injured, and for four years immediately preceding that time, claimant's decedent had no other employment than that of carpenter, unless it should be said that while performing certain contracts he is said to have made he was not employed as a carpenter. It, of course, is immaterial how many employers he had during the last or any year if his employment was the same, viz. that of carpenter. The record affords no information upon the subject of his contracts for the year preceding his death; indeed, it is not clear that during that year he made and performed any contract. The man who worked with him for the last four years testified:

"We took contracts, but we didn't contract very steadily. We would take a building by the job and do that, and maybe the next one would be by the day, and that is the way we did."

The claimant testified:

"He was employed during the last four or five years before his death at carpenter work and contracting."

[1] The record further shows, without dispute, that carpenters in Cadillac, where the deceased lived, worked all the year at their employment if they can find work to do, but that in the winter season outside work is not generally practicable. This may be said to be the rule in this latitude. Two months or more in the winter are dull months for those in the building trades, although it is common knowledge that inside finishing and repairing of buildings may be and is carried on during the winter. It is a fair inference from the testimony that in Cadillac carpenters are usually idle for the most part for two or more months in the winter.

Findings A, B, and C of the board, so far as they relate to employment, rest upon the testimony referred to. In any event, there is none which contradicts it. The record shows, too, by the testimony of the man who worked with him, that during the last four years before the injury occurred "the rate of wages paid was 30 cents, and 10 hours constituted a day's work."

The findings A and B are not supported by testimony, because the testimony does not show, and there is none supporting the inference, that the deceased was not working substantially the whole of the year preceding the injury in the employment (carpenter) in which he was working when injured. The finding C is also unsupported, except as to the fact that during a substantial portion of the year immediately preceding the injury the deceased was working for himself.

What is the meaning of that part of finding C which reads, "that during a substantial portion of the year immediately preceding the injury which caused the death of Edward Campbell he was working for himself"? If it means that he was working by the job, and not by the day, the testimony does not support the finding, because, as has been pointed out, there is no testimony from which it can be found what, if any, portion of the time he was employed in doing work by the job.

[2] We think the rule generally to be applied in cases like this is the one first laid down in the statute, namely, that the fifty-second part of the average annual earnings is the average weekly wages. One may be forced to apply the fourth rule (see Andrejwski v. Woverine Coal Co., 182 Mich. 298, 148 N. W. 684, Ann. Cas. 1916D, 724), because none of the others can be reasonably applied. It appears that claimants decedent here sometimes took a building by the job. The natural inference from this language, and perhaps the necessary one, is that he furnished the materials as well as labor for a building. But, as has been pointed out, the testimony does not show whether a large or a very small proportion

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of the time was employed in job work, and does not show with certainty that during the last year any jobs taken.

The statute, as we said in Adrejwski v. Wolverine Coal Company, "did in fact make provision which applied to all cases of such injuries and deaths occurring in all employments."

The committee of arbitration and the Industrial Accident Board act, necessarily, upon the evidence produced to them. We realize the difficulty which arises in cases like this one in applying the statute rule. But we think that there it is a matter of failure of proof and of proof which the respondent company is not in a position to produce. The rules of the statute are based upon the discovery of the amount of average annual earnings of the injured employee. The testimony does not furnish a complete basis for making this discovery. The fourth rule is:

"In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same * * * class, working in the same * * * employment, in the same * * * locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time."

What the board did not do was to discover and state the average or any annual earning capacity of the deceased employee, or that of a carpenter working in Cadillac. We are of opinion that from the evidence produced it is not possible to state with certainty the average or any annual earning capacity of the injured man, and the necessary evidence is not in the possession of the respondent. There is a failure of evidence for which respondent is not responsible. We agree with counsel for respondent that it is unfair, upon this record, "to hold that Mr. Campbell's temporary employment for a period of six weeks by the defendant should automatically put him on a full time basis as to compensation under the statute." It is not, we think, improper to suggest that probably evidence may easily be procured to show the average earning capacity of a carpenter in Cadillac. It is not unlikely that the witness Mr. Ready, who worked with the deceased during the last four years of his life, can, from memory, furnish data from which it can be ascertained whether deceased worked any of the time by the job during the last year; can, in any event, furnish data for ascertaining the average annual earnings of a carpenter in Cadillac. Engberg v. Victoria Co., 201 Mich. 570, 167 N. W. 840.

The award must be set aside, and the cause remanded for further proceedings. The costs of this appeal will be evenly divided between the parties.

SUPREME COURT OF MICHIGAN.

MILLER

v.

S. FAIR & SONS ET AL. (No. 64.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"EMPLOYMENT."

The work of one engaged in what is ordinarily described as common labor is an "employment" within the meaning of the Workmen's Com-

*Decision rendered, April 3, 1919. 171 N. W. Rep. 380.

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pensation Act, so that a servant employed in shoveling, requiring two hands, at the time of his injury, was not wholly disabled, but was only partially disabled, where he could do other work with one hand.

(For other cases, see Master and Servant, Dec. Dig. § 385[10].)

(For other definitions, see Words and Phrases, First and Second Series, Employment.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPUTATION OF COMPENSATION.

In computing compensation for one partially disabled, average weekly wages that injured servant has been able to earn since his injury is a factor, but not wages he has been able to earn since the injury.

(For other cases, see Master and Servant, Dec. Dig. § 385[8].)

Error to Industrial Accident Board.

Proceedings by John Miller, under the Workmen's Compensation Act, to obtain compensation for personal injuries, opposed by S. Fair & Sons, employer, and the Fidelity & Casualty Company, insurer. From an award which he considers insufficient, the applicant brings error. Award amended and affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

R. L. Crane, of Saginaw, for appellant.
Cummins & Nichols, of Lansing, for appellees.

OSTRANDER, J. Claimant was injured March 23, 1916. His average weekly wages were $12.70. The rate of compensation agreed upon by claimant and the insurance company carrying the risk, and approved by the industrial accident board, was $6.35 per week, "subject to the terms of the act." The statute (Act No. 10, Public Acts 1912 [Ex. Sess.] pt. 2), so far as it applies reads:

"Sec. 9. While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half his average weekly wages. * * *

"Sec. 10. While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter. * * *

"Sec. 11. * * * The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury."

We have held that, reading these provisions together:

"The language of this last provisions is plain, and has but one obvious meaning designating as the test capacity to earn in the same employment in which the employee was injured. That under this rule instances may arise where it works inequitably does not authorize the court to read exceptions into it or modify its plain language defining the basis for estimating incapacity, which at best can only be approximated. If the method ought to be changed or exceptional cases provided for, the remedy rests with the Legislature." Foley v. Detroit United Railway, 190 Mich. 507, 515, 157 N. W. 45, 48.

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And in Jameson v. Walter S. Newhall Co., 200 Mich. 514, 166 N. W. 834, when claimant was permanently disabled from pursuing the employment in which he was engaged when injured, but was nevertheless later on able to secure other and different employment, a finding that he was permanently wholly disabled, within the meaning of the act, was sustained. See, also, Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A, 374, Ann. Cas. 1915B, 997.

In the case now before us, the Industrial Accident Board made the following finding and award on March 16, 1918:

"A petition having been filed by the applicant in the above-entitled cause, praying for reasons therein set forth that payments of compensation be continued therein, and the same having come on to be heard before the board on February 14, 1918, and proofs and briefs having been filed and due consideration having been had thereon, the board finds as a fact from the files and testimony that said applicant is partially incapacitated as a result of the accidental injury received while in the employ of said respondents on March 23, 1916; that he has been employed part of the time since the date of the completion of the last payment of compensation, May 18, 1917; that while employed, with the exception of about two weeks following May 18, 1917, he has received reduced wages; that said applicant should receive compensation while employed at the rate of one-half the difference between his wages before the accident and the wages he has received thereafter from the time he resumed work, May 16, 1917; that if said applicant should be at any time, either before or after the date of this order, unable to continue his work or unable to secure employment because of any disability resulting from his accidental injury, then he should be paid compensation at the rate of $6.35 per week in accordance with the terms of the agreement approved by the board April 29, 1916, during such periods; that there is now due and payable to said applicant by said respondents compensation from the time payments were stopped, May 18, 1917, to the date of this order in conformity with the foregoing, which sum shall be paid presently.

"It is therefore ordered and adjudged that said applicant is entitled to receive and recover from said respondents compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, during his partial disability, in the employment in which he was engaged at the time of his injury, said payments to commence on May 18, 1917, the date of the last payment made to applicant by respondents.

"It is further orderd that at the present time applicant is entitled to receive compensation from May 18, 1917, to the date of this order, less amounts earned during that period and the sum due shall be paid forthwith.

"It is further ordered that, if at any time applicant, during his disability, is unable to perform or secure work in view of said disability, then he shall receive compensation at the rate of $6.35 per week in accordance with the terms of the agreement approved by the board April 29, 1916."

Upon further application in the nature of application for a rehearing, and upon the whole record, the board made the following finding and award:

"(a) That the expression 'less amounts earned during that period' used in the third paragraph of the order of March 16, 1918, was intended to mean that the applicant was not to be paid workmen's compensation during any time he was able to work and earn full wages, and that said expression was not intended to mean that the earnings of the applicant should apply upon the compensation to which he should be entitled.

"(b) That the applicant was injured while doing the work of a com-

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mon laborer, such as wheeling, shoveling, and mixing sand and carrying things necessary to be carried around the foundry.

"(c) That the applicant at the time he was injured was not engaged in employment as a molder, and that he was not a molder.

"(d) That his average weekly wage at the time he was injured was $12.70; that his compensation rate during total disability was and is $6.35 per week.

"(e) That at a time about 14 months after the man was injured he returned to the employment in which he was injured, but only worked a couple of weeks, or some such time, and that it does not affirmatively appear that he worked steadily during that time, and hence it may be that during all the time since the man was injured he may be entitled to receive compensation either for total or as for partial disability.

"(f) That during all of the time since March 23, 1916, during which the applicant has not been able to earn at all he shall be paid $6.35 per week.

"(g) That running an elevator is in the judgment of the board common labor, and that during any of the time since the applicant was injured in which the applicant has been able to earn some wages at common labor he is entitled to be paid one-half of the difference between the wages he has been able to earn at common labor and $12.70 per week, his average weekly wages at the time he was injured.

"(h) That it appears to the board that the hand of the applicant is in quite bad condition and that it is likely that the applicant will be either totally or partially disabled for some considerable time to come. That during a part of the immediate future he may be totally disabled and during a part of the time he may be partially disabled, and it is impossible for the board to say at present just what the future will develop in his case. That it cannot be said to a certainty that he will be totally disabled nor that he will be only partially disabled, and therefore the order of the board should provide for either condition."

There was evidence supporting the finding that when injured the employment of claimant was that of common laborer. The labor he was performing, shoveling and wheeling a barrow, required the use of both hands. He can and does perform labor which does not require the use of the right hand and arm. It is the contention of claimant that because he cannot do the work he was doing when he was injured his case is governed by the decisions above referred to, and that he should be allowed compensation as for total disability while the disability continues.

Employing the language of claimant's brief the contention is:

"Claimant being incapacitated from doing the kind of work, or similar employment, being done when injured, or any part of it, entitles him to what compensation during the disability? We contend full compensation not exceeding 500 weeks."

[1] The award must stand unless, as claimant contends, one who is a common laborer, and is disabled while doing some particular labor requiring the use of both of his hands and arms, is totally disabled if on account of an injury he cannot perform the same labor or labor which requires the use of both arms and hands, but can perform other common labor. We are unable to make the required distinction, being of opinion that the work of one engaged in what is ordinarily described as common labor is an employment within the meaning of the act. The act does not classify persons employed at labor, but it does recognize that there are different kinds of employment. The act was intended to affect and apply to existing conditions, one of which generally recognized, is that persons are employed as common laborers—that the employment of certain wage-earners is, and is known as, common labor. A definition of common labor, exclusive and inclusive, is not easily formulated, but the common understanding is, for the purposes of this de-

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cision, illustrated in the testimony of the claimant. Upon direct examination, the questions and answers referred to are:

"Q. What were you doing at the time of the injury in question? A. Just common labor.

"Q. Well, go right on and describe what you were doing for the respondent? A. Shoveling sand and carrying pots where they melt, the melted steel pots."

Stating that at the instant of his injury he was assisting three others in carrying a tank, he was asked, "Was the carrying of this tank a part of your duties and work at the time?" and he answered, "Yes." On cross-examination, the following testimony was given:

"Q. How long had you been working for the S. Fair & Co., when you got hurt? A. For about six weeks.

"Q. In that six weeks what was the nature of your duty? A. Just shoveling sand and carrying iron and stuff.

"Q. Shoveling sand and what? A. And carrying stuff around, parts, wherever they send us we go."

[2] Claimant's incapacity for work, in the employment in which he was engaged when he was injured, being partial and not, total, the compensation to which he is entitled was rightly computed accordingly. A criticism of the order and award of the board which might have been, but is not, made is that it specifies the wages he has been able to earn since the injury, and not the average weekly wages he is able to earn, as one factor in the computation. The award in this respect should be amended accordingly. Neither party will recover costs.

SUPREME COURT OF MICHIGAN.

MOYER

v.

PACKARD MOTORCAR CO. (No. 78.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY IN COURSE OF EMPLOYMENT—SUFFICIENCY OF EVIDENCE.

Evidence *held* not to support conclusion of Industrial Accident Board that deceased employee, employed as watchman of third, fourth, and fifth floors of building, and found in dying condition at bottom of elevator shaft, which elevator he had been forbidden to use, was called to shaft by any duty, or was performing any duty when he fell; undisputed evidence excluding him from shaft on every floor except perhaps first, where fire doors were open and safety gate in place.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Certiorari to Industrial Accident Board.

Proceedings by Mary Moyer for compensation under the Workmen's Compensation Act (Pub. Acts 1912 [Ex. Sess.] No. 10) for the death of Edward Moyer, the employee, opposed by the Packard Motorcar Com-

* Decision rendered, April 3, 1919. 171 N. W. Rep. 403.

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pany, the employer. From an order of the Industrial Accident Board making an award, the employer brings certiorari. Order vacated.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Angell, Bodman & Turner and Clifton G. Dyer, all of Detroit, for appellant.

Butzel & Butzel, of Detroit (Harry L. Weinstein, of Detroit, of counsel), for appellee.

OSTRANDER, J. Claimant's decedent, Edward Moyer, was a night watchman employed by the defendant. He had been so employed for eight days. The buildings of defendant's plant are numbered. One building, known as No. 15, was five stories high. In this building it was Moyer's duty to act as night watchman of the third, fourth, and fifth floors. In building No. 15 was an elevator, used for freight only, which ran from the first to the fifth floor. Moyer reported to the foreman of the watchman at the front gate of the plant at about 5:30 o'clock on the morning of March 17th. He was last seen by any one who gave testimony going from the front gate towards the building, which was about 100 yards from the gate. It was his last trip or round before quitting work. At some time between 5:32 and 5:35 o'clock his body was found in the bottom of the elevator shaft, which was four feet below the level of the first floor. He died shortly afterwards.

Testimony as to the extent and exact nature of Moyer's injuries is rather meager. A physician who saw him just before he died at the hospital to which he was immediately taken found, he says, a hemorrhage over one ear which, with other symptoms, led him to believe there was a fracture at the base of the skull, and a broken arm. His examination was superficial as it was evident that the man was dying. An autopsy was performed, but not until the body had been emblamed, making it rigid. The doctor found a fracture of right forearm and of the right wrist, and lacerated contusion of the right eye. He does not describe a fractured skull, and says he concluded the man died from internal injuries—"rupture of the intestines, something of that kind."

The undisputed evidence shows that Moyer had no duties to perform on the first or second floors of the building. It was his duty to ascend by stairs to the third floor and to inspect to some extent the third, fourth, and fifth floors, leaving a record of his presence there by punching or otherwise manipulating clocks or machines. No work was carried on during the night in question on the third, fourth, or fifth floors. Work was carried on on the first floor. The elevator shaft was inclosed, there being a safety gate operating automatically at each floor, and, in addition, fire doors made of heavy wood and covered with tin or some other metal. At about 5:30 o'clock the night operator of the elevator, quitting work, left it on the first floor, locked; the fire doors on each of the floors being closed. Considerable effort was required to open and close the fire doors. At the time Moyer's body was found, the elevator was at the fifth floor, and on each the second, third, fourth, and fifth floors the fire doors were closed. On the first floor the fire doors were open and the automatic safety gate down and in place. Moyer had no right to use the elevator, and, so far as is disclosed, never had used it to the knowledge of the foreman or any official of the defendant company. It was an electric elevator. Both the night and day operators of the elevator had keys which would unlock it or unlock the box which controlled it, but a piece of metal could be used to perform the same duty which the keys performed. The elevator was 10 by 20 feet in dimensions. At each floor, as the elevator reached it, the safety gate

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was automatically lifted. There was then a space of 15 inches between the elevator and the fire door. The elevator was inspected at 4:30 o'clock on the afternoon of March 16th, and again at 7 o'clock on the morning of the 17th after the accident, and on both occasions found to be in perfect running order. Moyer had been instructed by the foreman of the plant watchmen not to touch or go upon the elevator under any circumstances. Other facts which, like some of those already recited, may excite speculation, but support no definite conclusion as to how Moyer came to be injured, are the following: Under the bottom of the elevator there was suspended a telltale—a cord with a stick at the end of it. Its purpose was to warn any one who was looking into the shaft of the approach of the descending car. A portion of this was found in the pit with the body of Moyer. Mr. Moyer had trouble with his feet, and had been seen removing his shoes and putting talcum powder in them or in his hose. A package of talcum powder was found on his body.

In the opinion of the Industrial Accident Board it is said, among other things:

"There is a lot of testimony, but the board is not able to figure out how this man fell to his death. He was there and about his work and was found in the elevator pit within a few minutes after the elevator man left the elevator. The theory of the applicant is that the deceased, in making his rounds on the morning in question, became aware of some unusual condition, and for some reason endeavored to look into the elevator shaft, and in so doing fell into the elevator pit and met his death. What took the elevator from the first floor to the fifth floor we do not know. It may be possible that the elevator man is mistaken, and that he did not leave the elevator at the first floor, although there is no testimony to the contrary.

"The man was a watchman. It was his business to keep watch or guard the duties of a watchman necessarily call for a careful supervision of the building or locality to which he is assigned, and if something unusual occurs in any part of the building or in the elevator, or the elevator shaft, which is a part of the building, we believe it would be incumbent upon him to take proper measures to correct the improper condition. It was said, in Wishcaless v. Hammond-Standish Co., 201 Mich. 192, 166 N. W. 993, that in a proceeding for workmen's compensation on account of the death of an employee, where the facts proven necessitate a natural and reasonable inference that the accident happened while the employee was in the course of his employment, the employer, if he disputes the claim, has the burden of showing that the accident did not so occur.

"We do not know but that some workman other than the deceased employee used this elevator and left some of the doors open, and that the watchman noticed the improper condition, and in endeavoring to ascertain the cause of the same met his death. The theories as to how the accident could happen are not of much benefit to us. Nobody knows just how it did happen, but the man evidently fell into the elevator shaft while in the course of performing his duties, and we think that the evidence warrants the conclusion that the accident arose out of and in the course of the employment of the deceased. Where an employee is killed, and facts are proven the natural and reasonable inference from which is that the accident happened while the deceased servant was engaged in his employment, the master has the burden of proving the contrary. Papinaw v. G. T. Ry. Co. of Canada, 189 Mich. 441, 155 N. W. 545."

In determining the ultimate facts, the Industrial Accident Board may draw rational and natural inferences from the evidence. The board concluded:

(1) "If something unusual occurs in any part of the building, or in the elevator, or the elevator shaft, which is a part of the building, we

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believe it would be incumbent upon him [Moyer] to take proper measures to correct the improper condition."

(2) "Nobody knows just how it did happen, but the man evidently fell into the elevator shaft while in the course of performing his duties, and we think that the evidence warrants the conclusion that the accident arose out of and in the course of the employment of the deceased."

The evidence supports the conclusion that the man in some way got into the elevator shaft and fell to the bottom. But there is no evidence supporting the inference that his duty called him to the shaft or that he was performing any duty when he fell into it. The undisputed evidence shuts him out of the shaft upon every floor except, perhaps, indulging inference, the first floor, where the fire doors were found open and the safety gate in place. The elevator was in proper working order. Therefore, he could have gained entrance to the shaft on the first floor only by climbing over or rolling under the safety gate, or by opening the fire doors and attempting to use the elevator. Mr. Moyer had no duties to perform on the first floor of the building, and was forbidden to make use of the elevator.

The facts, material facts, have been stated. Any one so disposed may exercise imagination in using them to construct a history of what occurred. But imagination so indulged will fail to connect the presence of Moyer in the shaft with the performance of any duty. The facts do not warrant the application of the principle relied upon by the board and stated in the Papinaw and the Wishcaless Cases. Wishcaless was operating the elevator in the shaft of which his body was found, and Papinaw was in a place where his duties required him to be.

We are of opinion that the conclusion of the board is wholly unsupported by evidence, and that its order in the premises must therefore be vacated.

SUPREME COURT OF MICHIGAN.

SCOTT

v.

O. A. HANKINSON & CO. ET AL. (No. 25.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF INDUSTRIAL ACCIDENT BOARD — REVIEW.

By the Workmen's Compensation Act (Comp. Laws 1915, § 5465), the finding of the Industrial Accident Board on a question of fact is final, unless there was no competent legal evidence from which the fact might have been found.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF FACT OF EMPLOYMENT—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain the finding of the Industrial Accident Board that the injured servant was in the employ of the partner-

*Decision rendered, April 3, 1919. 171 N. W. Rep. 489.

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ship against which he was proceeding under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—HIRING FOR UNDISCLOSED PRINCIPAL—ELECTION OF SERVANT.

If a partnership acted as agent in making a contract of hiring with claimant for compensation, and failed to disclose the principal, and claimant was led to contract under belief it was with firm as principals, claimant, on learning the facts, could treat his contract as binding either the firm, or their principals, at his election; and, having elected to hold the firm, they must answer to him, under the Workmen's Compensation Act, as principals.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Certiorari to Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Act by Frank W. Scott, the employee, opposed by O. A. Hankinson & Co., the employer, and the Travelers' Insurance Company, the insurer. Compensation was awarded by the Industrial Accident Board, and the employer and insurer bring certiorari. Finding and order of board affirmed.

Argued before Bird, C. J., and Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

Vandeveer & Foster, of Detroit, for appellants.
Lee N. Brown, of Ypsilanti, for appellee.

KUHN, J. [1] Certiorari to the Industrial Accident Board. The sole question in this case is whether or not there was any evidence to support the finding of the Industrial Accident Board that applicant was, at the time of the accident, in the employ of the respondent, O. A. Hankinson & Co. The finding of the board is final (Comp. Laws 1915, § 5465), unless there was no competent legal evidence from which such fact might be found. See Reck v. Whittlesberger, 181 Mich. 468, 148 N. W. 247, Ann. Cas. 1916C, 771; Kennelly v. Stearns Salt & Lumber Co., 190 Mich. 628, 157 N. W. 378.

O. A. Hankinson & Co., a copartnership composed of Oliver A. Hankinson, Lee Hankinson, and Robert Wiard, were the contractors for the installation of the plumbing, heating, and ventilating systems in the new Administration Building of the Michigan State Normal College at Ypsilanti. They sublet the installation of the heating and ventilating systems to the Toleda Exhaust & Blowpipe Company. The latter company entered upon the performance of its contract, but did not make satisfactory progress, owing to shortage of labor, difficulty in obtaining material, and lack of money, and the work finally came almost to a standstill. To enable them to proceed, the O. A. Hankinson Company guaranteed the payment of certain amounts due for material, agreed to advance money for the payment of labor, etc., and undertook to secure experienced laborers to complete the work. At the request of the Toledo Company they inserted the following advertisement in the Detroit papers, under the heading of "Male Help Wanted":

"Tinners and Lathers. Apply O. A. Hankinson & Co., Ypsilanta, Mich. 'Phone 312-F, 1."

Applicant was at the time working on the main building as a tinner in the employ of the Pudrith Roofing Company, of Detroit, who were the contractors for the roofing. He had previously made some in-

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quiries with a view to securing employment on this heating and ventilating job, and, after the advertisment appeared, applied to Mr. O. A. Hankinson personally and was employed, and, as soon as they were ready for him, commenced work as a tinner on this heating and ventilating system. Three days later, while he was at work, a laborer who was wheeling a piece of iron tie beam in a wheel-barrow for use by applicant in connection with his work, in some way allowed the load to tip over, and the iron beam fell on Mr. Scott's left foot, crushing and cutting it severely.

It is the claim of O. A. Hankinson & Co., that, in the employing of Mr. Scott, Mr. Hankinson was merely acting as agent for the Toledo Exhaust & Blowpipe Company, who were still the contractors for this work, and that Mr. Scott thereupon became an employee of the latter company. Mr. Scott, however, claims that no mention whatever was made of the Toledo Company in the contract of hiring, but, on the contrary, to use his words:

"Mr. Hankinson said he was very glad to get me to help on the ventilating work at the school; that I should consider myself engaged to O. A. Hankinson & Co.

And in another part of the record we find the following testimony:

"Q. I would like to know of Mr. Scott if he can give the date that he fixed the price with Mr. Hankinson as to the wage he received. A. Well, I can figure it out. It was September 28th that I was hurt; that was on Friday, and it was the—the second Sunday after that. Friday, Saturday, Sunday; the second Sunday evening.

"Mr. Vandeveer: That would be what, the 6th or 7th?

"Mr. Brown: The 7th.

"Q. Did you ever tell Mr. Scharer here, that has just been on the stand, or any one else, that you were working for the blowpipe company? A. I did not.

"Q. Did you know anything concerning the blowpipe company? A. I did not. I never had any connection with them, or any knowledge of them at all. My entire arrangement was with Mr. Hankinson entirely.

"Q. Now, will you give the exact language that took place when the price was fixed as to what you were to receive an hour? A. Mr. Hankinson was solicitous about my condition, seemed to be. We were good friends, and he says, 'What hours were you putting in on that work out there; how many hours a day?' I told him nine hours. He says, 'I am paying 50 cents an hour; will that be satisfactory to you?" I told him it would. He says, 'I hope you won't be laid up very long.' He says, 'I need you up there to go on with this work.' And he says, 'Anything I can do for you I would be glad to do.' He says, 'Do you need any money?' I says, 'No; not just at present.'

"Did you have any conversation with Mr Wiard, who has just been on the stand, in which you told Mr. Wiard that you were going to work for the blowpipe company?

"A. Yes, sir—no not for the blowpipe company. My connection with Mr. Wiard was while I was working on the main building. I had heard through workmen there that Mr. Hankinson had the contract for the ventilating work. I went over to see Mr. Wiard. He is a friend of mine, and I told him that I would like to get a job working for Mr. Hankinson on that ventilating work. I understood he had it, and, 'Well,' he says, 'I will see Mr. Hankinson and see if I can get you the job.' A short time after that he says, I have seen Mr. Hankinson, and Mr. Hankinson says he would like to have you; just the man he wanted, and to engage you.' He says, 'Consider yourself engaged.' So later I walked up to Mr. Hankinson and asked him if he had made arrangements

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with Mr. Wiard to hire me for work on the ventilating. He said that he had; he was glad to get me, and to go to work in a few days.

"Q. Did you ever have a conversation with him in which you wanted him to show you where the pipes, and so forth, went, as he states, and in which you told him that you had hired out to the blowpipe company? A. Not that way.

"Q. Did you ever tell him you had hired to the blowpipe company? A. No, sir; I know nothing about that at all in any way. I never had anything to do with the blowpipe company. All of my transactions were with Mr. Hankinson. I met Mr. Hankinson down in the building, and I asked him again personally if he told Mr. Wiard to engage me. He said that he did, and I considered myself engaged to work for the O. A. Hankinson Company. * * * He says, 'We have got some iron coming and as soon as we get that fixed up, why, you can go to work.'"

Counsel for respondents say, in their brief:

"There is only one question before this court for determination, and that is. Does the record fairly and impartially disclose that the applicant Scott was an employee of the respondent Hankinson at the time he was injured and for which a claim for compensation was made and favorably acted upon by the Industrial Accident Board? * * *

"Counsel is well aware of the fact that the Supreme Court will not disturb the findings of the Industrial Accident Board, in the absence of fraud, where there is competent and legal evidence to support them; that such findings are conclusive. It is the respondents' contention, however, that in the case at bar the evidence does not support the finding of the Industrial Accident Board that the claimant was an employee of the respondent."

[2] If counsel mean to assert that there is no evidence whatever in the record upon which the board might have based the finding complained of, we cannot agree with their contention. The testimony above quoted is a sufficient answer to such a claim. And if counsel mean merely that there is not a preponderance of evidence to support the finding, respondents have no standing in this court. The question is not open to review.

Counsel further say:

"This record on its face discloses that even though Scott was hired by Hankinson, it was done by authority of, and on behalf of, the Toledo Exhaust & Blowpipe Company, and that the applicant was in the service of the Toledo Exhaust & Blowpipe Company. That in effect is the substance of the evidence taken as a whole."

[3] Even if it might be conceded that the real purpose of Hankinson & Co., and the Toledo Company was that Mr. Scott should be considered as in the employ of the latter—that he was to have been placed on its pay roll and under the direction of its foreman, it would not necessarily follow that the finding and award in this case was erroneous. If O. A. Hankinson & Co., were acting as agents and in making the contract of hiring failed to disclose their principal, and Mr. Scott was led to enter into the contract under the belief that he was contracting with Hankinson & Co., as principals, there can be no doubt, it seems to us, that Mr. Scott, upon learning the true state of facts, could treat his contract as binding either Hankinson & Co., or the Toledo Company, at his election. Having elected to hold O. A. Hankinson & Co., they must answer to him as principals, and a sufficient contract of hiring existed between them to enable Mr. Scott to enforce a claim under the Workmen's Compensation Law against the said company.

The finding and order of the Industrial Accident Board is therefore hereby affirmed.

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SUPREME COURT OF MICHIGAN.

STOCIN

v.

C. R. WILSON BODY CO. ET AL. (No. 81.)*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD FOR LOSS OF ARM—MEDICAL TESTIMONY.

Award of compensation for loss of an arm under the Workmen's Compensation Act, pt. 2, § 10, *held* justified by medical testimony that amputation of the forearm and wrist, though it had not destroyed the use of the arm entirely, had taken away a great deal of its function.

(For other cases, see Master and Servant, Dec. Dig. § 385[4].)

Certiorari to Industrial Accident Board.

Proceedings for compensation for injuries under the Workmen's Compensation Act by Peter Stocin against the C. R. Wilson Body Company, the employer, and the Royal Indemnity Company, the insurer. Compensation was awarded, and the employer and insurer bring certiorari. Award affirmed.

Argued before Bird, C. J., and Ostrander, Moore, Steere, Brooke, Fellows, Stone, and Kuhn, JJ.

John B. Coughlin, of Detroit, for respondents.

MOORE, J. The respondent C. R. Wilson Body Company was engaged in the manufacture of automobile bodies on October 8, 1917, and was operating under the Workmen's Compensation Act of the state of Michigan. The Royal Indemnity Company was on that date the insurer of the C. R. Wilson Body Company. It is agreed that on that date the plaintiff was an employee of the C. R. Wilson Body Company, that he received an injury arising out of and in the course of his employment, and that his wages were $21.60 a week. The said injury resulted in a crushed arm at the junction of the upper and middle third, necessitating amputation at a point shown on the annexed diagram. A claim was made, and the arbitration committee awarded plaintiff compensation for 200 weeks. An appeal was taken to the Industrial Board, who on July 26, 1918, made an award of 200 weeks' compensation. The case was brought before this court on a writ of certiorari to review the proceedings.

The respondent claims the Industrial Accident Board erred as follows:

(1) In making an award of 200 weeks' compensation.
(2) In finding that applicant has lost the right arm by amputation.
(3) In not finding that applicant is entitled to 150 weeks' compensation.

We are not furnished with a brief on the part of the appellee.

In the testimony of one of the doctors appears the following:

"Chairman Zierleyn: It is a fact, Doctor, the forearm is part of the arm proper? A. Yes, sir.

"Chairman Zierleyn: The forearm in this case has been amputated? A. Yes, sir.

* Decision rendered, April 3, 1919. 171 N. W. Rep. 352.

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"Chairman Zierleyn: Because of the amputation you have an atrophy of the muscles of the upper arm? A. That is right.

"Chairman Zierleyn: And to the ordinary layman it would appear that the man had lost the arm? A. That is right.

"Chairman Zierleyn: The fact of the amputation having taken place where it has taken place in this case has destroyed the use of the arm, has it not? A. It has not destroyed it entirely, but it has taken away a great deal of its function.

"Redirect Examination.

"By Mr. Coughlin: Q. Doctor, is not the fact it has taken away a great deal of the function due to the fact the forearm and wrist are gone and cannot be called into use as it would be if they were present A. Not entirely. In amputation of limbs, legs, and arms, the nerve control at the joint of amputation—it causes the nerves below to become atrophied. Loss of the part is mostly mechanical.

"By Mr. Ward (arbitrator for respondent): Q. Doctor, you say to the layman it would appear this man has lost his arm? Is that correct, looking at him? A. I would say part of his arm.

"Q. Assuming that you had not seen this man at all and you were described as to where it was amputated, what would you say as a doctor? A. I would say he lost his arm just as I did say."

The Industrial Accident Board based its award upon the finding:

"That as a matter of fact the applicant has lost an arm within the meaning of the Workmen's Compensation Law and is entitled to be paid $10 per week for a period of 200 weeks as for the loss of an arm."

In section 10 part 2 of Act No. 10 of Public Acts of 1912 (Ex. Sess.), it is provided that the compensation for an injury shall be "for the loss of an arm, fifty per centum of average weekly wages during two hundred weeks."

It is provided in Howell's Statutes, c. 1, § 2:

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as never have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

It is said in a Corpus Juris treatise entitled Workmen's Compensation Acts, in a note on page 41, as follows:

"The statute not having been designed to promote, but to decrease, the opportunity for unnecessary litigation, its purpose will be best subserved if plain words are given their ordinary signification. In re Nichols, 217 Mass. 3, 5, 104 N. E. 566, Ann. Cas. 1915C, 862.

"In giving construction to such statutes words are to be taken and construed in the sense in which they are understood in common language, taking into consideration the text and subject-matter relative to which they are employed. Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, 101, 142 N. W. 271, 272 (L. R. A. 1916A, 366, Ann. Cas. 1915B, 877)."

We think, applying the principles of law stated to the testimony of the doctor which we have quoted, it must be said that there is testimony to justify the award, and it is affirmed, with costs to the claimant.

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SUPREME COURT OF MINNESOTA.

GUTMANN

v.

ANDERSON. (No. 21191.)*

1. MASTER AND SERVANT—VICE PRINCIPAL—INJURY TO MINOR BY UNGUARDED MACHINERY.

The plaintiff, a minor under 16, was injured while working at a grinder with an unguarded intake gear in the defendant's meat shop. He claimed that he was put to work at the grinder by one Victor, who to some extent, was in charge, and that the work was a dangerous employment forbidden by Gen. St. 1913, §§ 3848, 3870, to boys under 16. No other fault was attached to Victor. Unless the plaintiff was employed in violation of the statute, he could not maintain a common-law action, for, if his employment was "legally permitted." His rights and the liability of the defendant were fixed by the Workmen's Compensation Act (Gen. St. 1913, § 8230g[2].) The court stated to the jury the effect of the statute and the conditions under which the defendant would be liable for the act of Victor in putting the plaintiff at work, and referred to his authority, express or implied in fact, as the representative of the defendant. After a verdict for the plaintiff it granted a new trial upon the ground that it submitted to the jury the wrong test of the vice principalship of Victor, that is, the rank or grade of service, instead of the non-delegable character of the duty resting upon the defendant. It is held that the charge adopted the proper test of vice principalship, namely, the non-delegable character of the duty imposed upon the defendant; that it properly stated the circumstances under which the defendant would be liable for Victor's act; and that a new trial should not have been granted because of the alleged error in the charge.

(For other cases, see Master and Servant, Dec. Dig. § 294[6], 366.)

Appeal from District Court, St. Louis County; Bert Fesler, Judge.

Action by Joseph C. Gutmann, by guardian, against Charles G. Anderson. Verdict for plaintiff, and from an order granting a new trial for errors of law, plaintiff appeals. Order reversed.

D. G. Cash and John B. Richards, both of Duluth, for appellant.
Larson & Marsch, of Duluth, for respondent.

DIBELL, J. Action by the plaintiff, a minor, to recover for personal injuries sustained while in the employ of the defendant. There was a verdict for the plaintiff. The defendant moved for a new trial upon three grounds: (1) That there were errors of law occurring at the trial; (2) that the verdict was not sustained by the evidence and was contrary to law; (3) and that the damages were excessive.

A new trial was granted upon the ground of errors of law and the plaintiff appeals.

[1] 1. The defendant operated a small meat market in Duluth. The plaintiff, a boy of 14, another boy of about the same age, a man by the

* Decision rendered, March 21, 1919. 171 N. W. Rep. 303. Syllabus by the Court.

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name of Axel Victor, and the defendant constituted the working force.

In the shop was a meat grinder operated by electric power. The plaintiff while operating it caught his hand in the intake gear, which was unguarded, and sustained an injury.

The right of recovery is grounded upon the employment of the plaintiff by the defendant in a dangerous place about machinery not guarded to the extent practicable. By G. S. 1913, §§ 3848, 3870, the employment of minors under 16 in certain dangerous employments is forbidden. It is clear that the ground stated is that upon which the recovery must rest if any is had in a common-law action. If the plaintiff's employment was "legally permitted" his rights and the liability of the defendant were fixed by the Workmen's Compensation Act and the question of negligence of one party or the other was unimportant. G. S. 1913, § 8230g (2); Westerlund v. Kettle River Co., 137 Minn. 24, 162 N. W. 680; Pettee v. Noyes, 133 Minn. 109, 157 N. W. 995. In the Westerlund Case the question of what constitutes an employment in violation of section 3848 and section 3870 is discussed; and the effect of an employment in violation of these sections upon the provision of the Workmen's Compensation Act (section 8230g [2]) bringing within its operation "minors who are legally permitted to work under the laws of the state" is decided.

At the time of the injury the defendant was out of the shop on business connected with it. Victor, a man 33 years of age and of some years' experience in the business, was in the shop. To some extent, at least, he was in charge. The claim of the plaintiff is that Victor directed him to operate the grinder and in giving such direction was a vice-principal of the defendant.

The court stating this claim to the jury, and referring to the responsibility of the defendant for Victor's action, so far as presently material, said:

"This is the law on that feature of the case and I will give it to you. It requires you to pass upon the question of fact, and you will bear in mind, as I proceed with the charge and refer to the negligence of the defendant, that as you decide the question of fact one way or the other as to Victor's statuts in that butcher business, you will apply the charge accordingly in determining the question of negligence: If Axel Victor, in defendant's absence from his place of business, was authorized by the defendant to have control over what plaintiff should do, or if defendant knew or under all the circumstances ought to have known that in his absence Victor was in the habit of exercising control over what plaintiff should do, and Victor on June 19th directed the plaintiff to grind sausage, or hamburger, requiring the use of the machine which injured him, you are instructed that the directions of Victor to plaintiff would be in law the directions of the defendant, and, in such case, the defendant would be responsible for any negligent acts of Mr. Victor resulting in injury to the plaintiff, if such act was committed in the course of his employment, or in the line of his duty, with a view to the furtherance of the defendant's business. The fact that Victor may have exceeded his actual authority, or even disobeyed his express instructions, would not alter this rule."

A new trial was granted on the ground that the giving of this instruction was error. The view of the trial court was that it left the question whether Victor was a vice principal to the jury, but gave it the wrong test for its determination; or more specifically that instead of making the question determinable upon whether the duty cast upon Victor was a nondelegable duty of the defendant, which is the test of vice principalship in this state, it employed the grade of employment or superior servant rule applicable in some states.

The defendant could not employ the plaintiff in violation of the two sections cited without making himself liable for the consequences resulting from the unlawful employment; nor could he evade liability

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by authorizing Victor to put him at forbidden work. Victor's act in such case would be his act; or we may say, stating it negatively, and it seems to be the same thing, that the duty to refrain from putting a boy under 16 at work forbidden by the statute is nondelegable.

The law put upon the employer certain duties or obligations which are nondelegable in the sense that he cannot authorize them to be done by some one else and escape responsibility for the manner or lack of their doing. They can be discharged only by performance. Such in general is the furnishing of a reasonably safe place in which to work; the furnishing of reasonably safe tools and instrumentalities; the proper supervision of the work in certain cases; sometimes warning and instructing; the guarding or fencing of machinery; and in general the doing of such things as are necessary to meet the positive requirements of a statute enacted for the safety of employees. Dunnell, Minn. Dig. & Supp. § 5668 et seq.; 4 Labatt, Mast. & S. § 1495 et seq.

The statute which we have cited adopts a definite standard of duty. The employer must not put minors under 16 in certain dangerous employments. The prohibition is absolute. If Victor, under an express or implied delegation of authority from the defendant, put the boy at prohibited work at a dangerous employment in violation of the statute, the defendant was as much liable as if he had done so himself. Victor was then a vice principal, for a vice principal is one, whatever his work, who with competent authority discharges a primary or nondelegable duty of the employer.

The defendant cites Pasco v. Minneapolis etc., Co., 105 Minn. 132, 117 N. W. 479, 18 L. R. A. (N. S.) 153. There it was held that the power conferred upon a foreman to direct the work of the employees in the mere manner of its doing did not make him a vice principal. This is a general principle. In the application of it there is often difficulty. It has no special application here for the statute applicable to the situation casts a duty negative in character upon the defendant and it cannot be delegated or evaded.

We are unable to hold that the instruction of the court was erroneous. It did not adopt the grade of employment or superior servant rule. It made the defendant liable, if at all, not because Victor was somewhat in control of the plaintiff and had some authority to direct him, but only in the event that he had express or implied authority to put him at the work prohibited by the statute and did so; and in such event the jury was told that his act was the defendant's act. The relative rank or superiority in service of Victor and the plaintiff was not put to the jury as the test. Whether he, under competent authority from the defendant, put the plaintiff at forbidden work, was made the test. The nondelegable character of the duty was the test and not superiority in rank or service.

We do not understand that it is claimed that the plaintiff might not have been properly employed about the shop in some capacity without a violation of either section 3848 or section 3870; and we are not now concerned in considering the character of the machinery in use, nor the character of the employment, nor the character of the evidence bearing upon the issue whether Victor did in fact put plaintiff at forbidden employment. We hold the charge was correct and that a new trial should not have been given because of the error alleged in it.

[2] 2. The plaintiff may sustain an order granting a new trial upon the ground of errors occurring at the trial if he can show other errors of law, properly raised, sufficient to justify the granting of the motion. McAlpine v. Fidelity, etc., 134 Minn. 192, 158 N. W. 967, and cases cited. No error other than that assigned relative to the charge is particularly urged and we find none.

[3] 3. If a new trial is granted because of the insufficiency of the evidence or because of excessive damages the order is not appealable.

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This is the effect of G. S. 1913, § 8001, subd. 4. McAlpine v. Fidelity, etc., 134 Minn. 192, 158 N. W. 967; Heide v. Lyons, 128 Minn. 488, 151 N. W. 139; Pust v. Holtz, 134 Minn. 266, 159 N. W. 564.

The new trial was granted solely because of errors of law at the trial. No other ground of the motion was considered by the trial court. Upon the grounds assigned, other than that of errors of law, the parties have had no decision. Upon the going down of the remittitur they will be for consideration by the trial court.

Order reversed.

SUPREME COURT OF MONTANA.

SHEA

v.

NORTH-BUTTE MINING CO. ET AL. (No. 4348.)*

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DISCRIMINATION BETWEEN EMPLOYER AND EMPLOYEE.

The difference in modes by which employee and employer may indicate their election to be bound by Workmen's Compensation Law is not objectionable on the ground that it discriminates against either.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

7. MASTER AND SERVANT—WAIVER OF PROVISIONS OF LAW.

It is competent for an employee to waive the advantage of any provision of law which was intended solely for his benefit, so long as the waiver does not violate public policy (Rev. Codes, § 6181).

(For other cases, see Master and Servant, Dec. Dig. § 87.)

12. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—CONSTITUTIONALITY.

The Industrial Accident Board, created by Workmen's Compensation Law, is not an unlawful body because the state auditor is a member, the only limitation found being in Const. art. 4, § 1, forbidding imposition of duties on auditor that appertain to legislative or judicial departments.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Murty Shea against the North-Butte Mining Company and Norman Braly. Judgment dismissing action, and plaintiff appeals. Affirmed.

H. H. Parsons, of Missoula, E. K. Cheadle, of Lewiston, W. D. Rankin, of Helena, and B. K. Wheeler, and Maury & Melzner, all of Butte, for appellant.

L. O. Evans, of Butte, W. B. Rodgers, of Anaconda, and D. M. Kelly, of Butte, for respondents.

* Decision rendered, March 8, 1919. 179 Pac. Rep. 499.

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BRANTLY, C. J. The defendant North-Butte Mining Company is a corporation organized under the laws of the state of Minnesota, and is the owner of mining claims which it is engaged in operating in Silver Bow county. When the cause of action upon which recovery is sought herein arose, the defendant Norman Braly was its superintendent. This action was brought to recover damages for a personal injury alleged to have been suffered by the plaintiff through the negligence of the defendants during the course of his employment as a miner. The complaint is in the ordinary form, and alleges facts sufficient to sustain a recovery, unless a recovery is precluded by the provisions of the act passed by the Fourteenth Legislative Assembly commonly known as the Workmen's Compensation Law (chapter 96, Laws 1915). Denying all the allegations of the complaint charging them with negligence, the defendants alleged as a complete affirmative defense that at the time the plaintiff was injured the defendant North-Butte Mining Company had elected to become bound by Plan No. 1 of the Workmen's Compensation Law, and had performed all the conditions prescribed by the act to render such election effective; that the plaintiff had also, pursuant to the terms of the act, elected to be bound thereby; and that, both plaintiff and defendant North-Butte Mining Company having made their election, the liability of the defendants to compensate the plaintiff for any injury suffered during the course of his employment through any negligent act or omission by them was such only as in that act provided. To this affirmative defense the plaintiff interposed a general demurrer, which was overruled. Thereupon, the plaintiff refusing to join issue by reply, upon application of defendants his default was entered and judgment rendered and entered against him dismissing the action, with costs. From this judgment he has appealed.

Plaintiff does not question the sufficiency of the answer to constitute a defense, provided the Workmen's Compensation Law is valid. Quoting from the brief of counsel: "The only question involved in this case is the constitutionality of the Workmen's Compensation Act."

The causes, from an historical point of view, impelling the enactment of Workmen's Compensation Laws, and the object to be served by them, have heretofore been stated somewhat at length by this court. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 Pac. 554; Lewis & Clark County v. Industrial Accident Board, 52 Mont. 6, 155 Pac. 268, L. R. A. 1916D, 628. It is not necessary to restate them. It is sufficient for present purposes to call to mind that the object sought was to substitue for the imperfect and economically wasteful common-law system by private action by the injured employee for damages for negligent fault on the part of the employer, which, while attended with great delay and waste, compensated those employees only who were able to establish the proximate connection between the fault and the injury, a system by which every employee in a hazardous industry might receive compensation for any injury suffered by him arising out of and during the course of the employment, whether the employer should be at fault or not, except only when the injury should be caused by the willful act of the employee. In other words, the theory of such legislation is that loss occasioned by reason of the injury to the employee shall not be borne by the employee alone, as it was under the common-law system, but directly by the industry itself, and indirectly by the public, just as is the deterioration of the buildings, machinery, and other appliances necessary to enable the employer to carry on the particular industry.

To every thinking person the object sought commends itself not only as wise from an economic point of view, but also as eminently just and humane. Such legislation, in whatever form it may provide compensation, has been formulated after the most patient study and investigation by our most eminent men in professional and industrial walks of life, in order to avoid such obstructions or limitations as might be encountered under our written constitutions. A persistent enlightened public opinion

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has brought about the enactment of such laws in a great number of the states of the Union. Some of them are elective, while others are compulsory; and though the validity of many, perhaps all, of them has been challenged on almost every possible constitutional ground, they have generally been upheld. Our own statute is elective. While it has been criticised on the ground that the schedule of rates of compensation provided for by it are not sufficiently liberal, and also on the ground that it makes an unwise and unjust discrimination against the dependents of aliens, yet that it operates more justly and more satisfactorily than the old system is demonstrated by the fact that as soon as it became operative, on July 1, 1915, the great body of employers as well as of employees in the various industries in the state accepted its provisions, and have since been subject to them, as administered by the Industrial Accident Board created by the act for that purpose.

[1] Under these circumstances, the rule that an act of the Legislature will not be declared invalid because it is repugnant to some provision of the Constitution, unless its invalidity is made to appear beyond a reasonable doubt, applies with peculiar force.

[2] It is said that the act is repuguant to section 6 of article 3 of the Constitution, which declares that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay." The respect wherein the act is repugnant to this provision is not specifically pointed out, but we gather from the brief of counsel that their objection is that, though the act is elective, it in effect closes access to the courts by the injured employee and compels him to seek relief, if he can obtain any at all, through the Industrial Accident Board. In other words, since the section declared in express terms that their shall be a judicial remedy for every wrong suffered by one person at the hands of another, it is beyond the power of the Legislature to provide any other remedy, though such other remedy is entirely optional.

The act is very long, and we shall not undertake to quote it. It will be sufficient to state the substance of the provisions which are made the points of attack by counsel. The modes provided by which the election must be made by both the employer and employee are prescribed in sections 3(f), 3(g), 3(h), 3(i), and 3(j). The employer is required to file with the Industrial Accident Board his election in such form as the board shall prescribe. It must state which of the three plans provided for he elects to be bound by, and a notice of it must be posted in a conspicuous place in his place of business, and also a copy of the notice filed with the board, accompanied by an affidavit showing that it has been posted as required. After the employer has made his election by complying with these requirements, every workman then employed by him, or thereafter entering his employment, is conclusively presumed to be bound by the act, unless he elects not to be bound by it. He shall make such election by written notice in the form prescribed by the board, served upon the employer, a copy of which must be filed with the board, together with proof of its service. If the employer fails to elect to come under the act, an ordinary action may be maintained against him for damages for an injury suffered by the employee in the course of his employment, or for death resulting from such injury, but the employer may not allege as a defense that the plaintiff was guilty of contributory negligence, or that the injury was caused by the negligence of a fellow servant, or that the employee had assumed the risk incident to the employment, or arising out of the failure of the employer to perform any of his common-law duties. On the other hand, if the employee elects not to be bound after the employer has elected to be bound, all the common-law defenses are available to the employer. It is declared to be the intention of the act that the employer shall elect to be bound before he

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becomes subject to it, and that the employee shall be presumed to have elected to be subject to it and under the plan stated by the employer, unless he shall affirmatively elect not to be bound by it. The employee may revoke his election at any time. The employer may make his election at any time. In case he does so, he becomes subject to the act for the remainder of the fiscal year. After having once made his election, he is bound for the rest of the fiscal year under the plan first elected, and also for the succeeding years, unless within not less than 30 nor more than 60 days before the end of the fiscal year he elects not to be bound by it, or unless within the same time he elects to be bound by some one of the other plans. Such election must be made in the same manner as the original election. It is further declared that when both the employer and employee have elected to be bound by the act its provisions shall be exclusive, and the election shall be held to be a surrender by both of their right "to any other method, form, or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action, action at law, suit in equity, or statutory or common-law right or remedy, or proceeding whatever, for, or on account of, any personal injury to or death of such employee," except as such rights are in the act itself specifically granted. The election shall bind the employee himself, and, in case of his death, his personal representative and all other persons claiming under him. The employer is likewise bound, together with those who may conduct his business during liquidation, bankruptcy, or insolvency.

[3] Three plans of compensation are provided for, differing in the mode by which benefits or compensation must be paid to the employee. Since no question is made as to the legal propriety of any of these plans or the mode of payment provided under each of them, it is not necessary to notice their distinguishing features.

The Industrial Accident Board consists of three members—the State Commission of Labor and Industry, the State Auditor, and the Chairman, who is appointed by the Governor for a term of four years, and receives a salary of $4,000 per annum. The other members receive no compensation other than their salaries as state officers. A majority of the board constitutes a quorum for the transaction of business. An appeal may be taken to the district court from any award made by the board, by any person affected by it. The trial in the district court must be de novo. The court may, on good cause shown, permit additional evidence to be introduced; otherwise the hearing must be upon the certified record of the proceedings of the board. If no appeal is taken, the award of the board is final.

We agree with counsel that, when an employee has elected to become subject to the provisions of the act, he may not thereafter prosecute an action for damages against the employer for an injury suffered by him during the course of his employment; nor may his personal representative prosecute such an action in case of his death. But counsel are in error in supposing that for this reason the Compensation Act is repugnant to the section of the Constitution quoted. Their contention is based upon a misconception of the scope of the guaranty therein contained. A reading of the section discloses that it is addressed exclusively to the courts. The courts are its sole subject-matter, and it relates directly to the duties of the judicial department of the government. It means no more nor less than that, under the provisions of the Constitution and laws constituting them, the courts must be accessible to all persons alike, without discrimination, at the time or times, and the place or places, appointed for their sitting, and afford a speedy remedy for every wrong recognized by law as being remediable in a court. The term "injury," as therein used, means such an injury as the law recognizes or declares to be actionable. Many of the state Constitutions contain similar provisions, and the courts, including our own, have held, either expressly or im-

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pliedly, that their meaning is that above stated. Johnson v. Higgins, 3 Metc. (Ky.) foot page 514; Barkley v. Glover, 4 Metc. (Ky.) foot page 39; Templeton v. Lynn County, 22 Or. 313, 29 Pac. 795, 15 L. R. A. 730; Martin's Executrix v. Martin, 25 Ala. 208; Cunningham v. City of Denver, 23 Colo. 18, 45 Pac. 356, 58 Am. St. Rep. 212; Mountain Timber Co. v. State of Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Middleton v. Texas L. & P. Co., 108 Tex. 96, 185 S. W. 556; Cunningham v. Northwestern Imp. Co., 44 Mont. 196, 119 Pac. 554. If the contention of counsel should be upheld, the consequence would be that the Legislature would be stripped of all power to alter or repeal any portion of the common law relating to accidental injuries or the death of one person by the negligence of another.

[4] It is true the Legislature cannot destroy vested rights. Where an injury has already occurred from which the injured person has a right of action, the Legislature cannot deny him a remedy. But at this late day it cannot be controverted that the remedies recognized by the common law in this class of cases, together with all rights of action to arise in future, may be altered or abolished to the extent of destroying actions for injuries or death arising from negligent accident, so long as there is no impairment of rights already accrued. This necessarily follows from the proposition, well established by the courts everywhere, that no one has a vested right in any rule of the common law. The technical defenses recognized by it in this class of cases, viz. contributory negligence, assumption of risk, etc., may be abolished or modified without transcending any constitutional and constitutional guaranty. Middleton v. Texas L. & P. Co., supra; Mountain Timber Co. v. State of Washington, supra; Cunningham v. Northwestern Imp. Co., supra; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; New York C. Ry. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Borgnis v. Folk Co., 147 Wis. 347, 133 N. W. 209, 37 L. R. A. (N. S.) 489; Sexton v. Newark Tel. Co., 84 N. J. Law, 85, 86 Atl. 451.

[5] This being so, there is no reason why technical rights of action arising out of the negligence of the employer may not be abolished by the Legislature in the same way. And so it is held by the courts of those states which have enacted compensation laws made compulsory, as in New York and Washington. If this is so, for a much stronger reason may it be asserted that there can be no objection to a compensation law which becomes binding upon the employer and employee at their election, but not otherwise. By way of inducement to the employer to accept the act, it is provided that if he refrains the technical common-law defenses shall not be available to him. As an inducement to the employee, his guaranty of compensation for any injury arising out of his employment becomes absolute, whereas, if he refuses to do so, he still has his action at law subject to all the common-law defenses. The employer cannot object because he has by his affirmative act elected to waive all objections to the extent of his liability and his obligation to make compensation. The employee cannot thereafter object if he fails to give the required notice of his refusal to accept the conditions imposed.

[6] The difference in the modes by which they may indicate their election is not objectionable on the constitutional ground that it discriminates against either employer or employee.

[7] The former is not in this case making any complaint; the latter cannot complain because it was competent for him to waive the advantage of any provision of law which was intended solely for his benefit, so long as the waiver did not violate public policy. Rev. Codes, § 6181; Parchen v. Chessman, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469, Ann. Cas. 1916A, 681. He may waive his right to a jury trial in the manner provided by law. Rev. Codes, § 6762; Chessman v. Hale, 31 Mont. 585, 79 Pac. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038. No one has ever questioned the power of the Legislature to provide a means by which the parties

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to a conrtoversy may waive a trial by a court and submit the matter to arbitrators selected by themselves, by whose award they are finally concluded in the absence of fraud, gross error, excess of power, and the like. Rev. Codes, § 7365 et seq.; Solem v. Connecticut Fire Ins. Co., 41 Mont. 351, 109 Pac. 432. Other illustrative cases might be cited. These, however, are sufficient to show that it is no objection to the legislation that the employee, after his election to become subject to the act, is conclusively bound to accept such compensation as may be awarded to him under its provisions. Nor is it a valid objection to it that it provides for a different mode of election by the employee from that provided for the employer. This feature of the legislation has been frequently considered by the courts, and has invarably been declared unobjectionable. The following cases are directly in point: In re Opinion of Justices, 209 Mass. 607, 96 N. E. 308; Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Sayles v. Foley, 38 R. I. 484, 96 Atl. 340; Sexton v. Newark Tel. Co., supra; Borgnis v. Folk Co., supra, Hunter v. Colfax C. Coal Co., 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15 ,Ann. Cas. 1917C, 803; Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 417; Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; Mackin v. Detroit-Timkin Axel Co., 187 Mich. 8, 153 N. W. 49.

[8] The silence of the employee establishes a presumption that he elects to be subject to the act. It is clearly within the province of the Legislature to establish presumptions and rules relating to the burden of proof, and a statute establishing a presumption of this character is valid, so long as the presumption is not unreasonable and not conclusive of the rights of the parties. Bielenberg v. Montana U. Ry. Co., 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813; Hawkins v. Bleakly, and other cases cited supra.

But counsel say that it is not competent for a party to waive the right to have his cause of action determined by a court before the cause of action arises. This court has expressly held under our statute (Rev. Codes, § 6181) that a party may waive in advance the advantage of the statute of limitations because it was intended solely for his benefit. Parchen v. Chessman, supra. If this is true, there seems to be no compelling reason why, under the express authority of the Legislature, he may not at his option waive in advance the advantage of any remedy established solely for his benefit which the Legislature itself may abolish, especially when it has provided a substitute remedy, which renders his right to relief absolute.

[9] It is argued that the act is invalid in that it constitutes the Industrial Accident Board a court, whereas the whole judicial power of the state is vested in the courts enumerated in section 1 of article 8 of the Constitution. Several of its provisions are cited as evidencing the fact that the functions of this body are judicial. The fallacy of this contention is fully demonstrated by the case of Cunningham v. Northwestern Imp. Co., supra. That case is decisive of counsel's contention. It is true that many of the functions exercised by the board are judicial in character; but that it is not vested with judicial power in the sense in which that expression is used in the Constitution becomes clear upon a moment's consideration. As used in the Constitution, the expression "judicial power" means "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller on the Constitution, 314. This power the board does not possess. It was created as a purely administrative body. It may hear evidence to enable it to make an award in a particular case, and to that end may call witnesses; but it is without power to render an enforceable judgment. and its determinations and awards are not enforceable by execution or by other process

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until a judgment has been entered therein on appeal to a regularly constituted court. Mackin v. Detroit-Timkin Axle Co., supra. In this case, after considering the Michigan act, the court said:

"We conclude that the Industrial Accident Board is a ministerial and aministrative body, with incidental quasi judicial powers, exercised by consent of those electing to be governed by the act, not vested with powers or duties in violation of constitutional limitations."

The same view is announced in the following cases: Hunter v. Colfax C. Coal Co., supra; Borgnis v. Folk Co., supra; Deibeikis v. Link Belt Co., supra; Middleton v. Texas L. & P. Co., supra; Pigeon v. Empire L. Ass'n Co., 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Greene v. Caldwell, 170 Ky. 571, 186 S. W. 648, Ann. Cas. 1918B, 604.

[10] It may be conceded for present purposes that some of the powers vested in the board are such as appertain exclusively to courts; for illustration, the power conferred by sections 18(d) and 18(f) to punish for contempt. Of this, however, the plaintiff cannot complain, as counsel for defendants point out in their brief, for two reasons: In the first place, plaintiff is not about to be tried by the board for a contempt, nor has he been convicted by it. Hence he is in no position to assail these provisions of the act on constitutional grounds.

[11] In the second place, though these provisions are assumed to be invalid, this assumption does not require the conclusion that any other provision is invalid. Section 24(b) declares:

"If any section, subsection, subdivision, sentence, clause, paragraph, or phrase of this act is for any reason held to be unconstitutional or void, such decision shall not affect the validity of the remaining portions of this act, so long as sufficient remains of the act to render the same operative and reasonably effective for carrying out the main purpose and intention of the Legislature in enacting the same as such purpose and intention may be disclosed by the act."

An examination of the act in its entirety will disclose that, even though the provisions referred to by counsel are eliminated entirely, there is still enough left to accomplish all the purposes for which the legislation was enacted. The district court of the county in which the board happens to be sitting at the time an appeal is taken, which is elsewhere provided for in the act, has full power to compel the attendance of witnesses and punish them for disregard of subpœnaes issued by the board.

[12] The next contention made by counsel is that the board is an unlawful body because the state auditor, one member of it, holds two offices. By this we presume counsel mean that because the auditor is made a member of the board, and is required to execute a bond to guarantee the faithful performance of his duties, this constitutes him a public officer, in a capacity other than as state auditor. A complete answer to this contention is found in section 1 of article 7 of the Constitution. This section enumerates the state executive officers. It then provides that they shall perform such duties as are prescribed in the Constitution and by the laws of the state: It is not necessary to refer to the constitutional duties enumerated appertaining to the auditor's office. The only limitation imposed upon the Legislature in imposing duties upon the auditor is found in section 1 of article 4. This prohibits the imposition of duties upon him that appertain to the legislative or judicial departments of the government. So long as this limitation is not violated, the Legislature is at liberty to impose any governmental duty upon this officer.

[13] The other contentions made by counsel are that the act denies a jury trial, and that it violates the clause of the Fourteenth Amendment to the Constitution of the United States guaranteeing to the citizen the

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equal protections of the laws. What we have said above in discussing the other questions heretofore determined disposes of these contentions.

The judgment of the district court is affirmed.

Affirmed.

Holloway and Cooper, JJ., concur.

SUPREME COURT OF NEW HAMPSHIRE.

MERRIMACK.

CALLAHAN

v.

BOSTON & M. R. R. (No. 1568.)*

1. COMMERCE—EMPLOYERS' LIABILITY ACT—"INTERSTATE COMMERCE"—TEST.

The test of whether or not a locomotive engineer was engaged in interstate commerce within federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) when he was injured is that, if the accident was incident to interstate work or to a whole day's work, partly interstate and partly intrastate, he is engaged in "interstate commerce."

(For other cases, see Commerce, Dec. Dig. § 27[6].)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

2. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT— APPLICABILITY—"INTERSTATE COMMERCE."

Where a locomotive engineer employed by a common carrier, acting under two orders, one to help an interstate freight train to summit and the other to return with his engine, was injured on his return trip, *held*, he was engaged in interstate commerce within federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

(For other cases, see Commerce, Dec. Dig. § 27[6].)

Exceptions from Superior Court, Merrimack County; Branch, Judge.

Suit by William E. Callahan against the Boston & Maine Railroad. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled.

Case under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]) to recover for injuries received by the plaintiff on January 21, 1914. Trial by jury and verdict for the plaintiff. At the time of the accident the defendant was a common carrier by railroad engaged in commerce between Vermont, New Hampshire, and Massachusetts, also in commerce within New Hampshire, and the plaintiff was in its employ as a locomotive engineer. On defendant's road, near Ashland, N. H., there is a point called the Summit, which is the apex of the grades from north to south and from south to north. At the time of the accident it was necessary to assist

*Decision rendered, March 4, 1919. 106 Atl. Rep. 37.

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heavy trains over the Summit from north to south and from south to north by attaching to them an extra engine called the helper.

The plaintiff was employed by the defendant to operate the helper. On the day of the accident there was occasion to help interstate train No. 604 from Plymouth to the Summit, and the plaintiff was assigned to the task. He was given a copy of the orders for operating No. 604, and in addition thereto, on a separate sheet, an order to return to Plymouth with his locomotive as soon as he left No. 604 at the Summit. He had no further orders. The accident occurred on his return trip.

At the close of the evidence the defendant's motion for a directed verdict upon the ground that the plaintiff was not shown to have been engaged in interstate commerce at the time of the accident was denied, subject to exception.

Martin & Howe, of Concord (De Witt C. Howe, of Concord, orally), for plaintiff.

Streeter, Demond, Woodworth & Sulloway, of Concord (Jonathan Piper, of Concord, orally), for defendant.

PEASLEE, J. [1] The question presented is whether the evidence warranted a finding that the plaintiff, at the time of the accident, was engaged in interstate commerce within the meaning of the federal Employers' Liability Act, as construed by the Supreme Court of the United States. Counsel do not differ materially as to the test to be applied. If the act the servant was performing at the time of the accident was incident to interstate work, or if it was incident to a whole day's work which was partly interstate and partly intrastate, he is within the provisions of the act.

[2] The defendant claims that when the plaintiff left train No. 604 he had completed his interstate employment, and that, as it does not appear what he was to do after returning to Plymouth, there is no evidence to warrant a finding that he was engaged in interstate commerce on that return trip. Reliance is put upon the fact that he had two orders, one to help the freight to the Summit, and the other to then return to Plymouth. But this is satisfactorily accounted for by the rule that all engaged in operating a train work under a common order. So long as his engine was attached to train No. 604 he would operate under the orders for moving that train. But, when his engine was detached, further and separate orders to direct his movements were necessary. For this reason his orders were in separate parts, one the order common to him and the men on train No. 604, and the other for his own direction after leaving No. 604. These orders were both given to him at the same time, and, taken together, made up the directions under which he left Plymouth. By them he was given a task to perform, and that task was not completed until he returned to Plymouth.

The argument that his return may have been to take up an intrastate task, if of value to the defendant upon the legal questions involved, is not supported by the evidence. There is no evidence to warrant a finding that he was ordered back to Plymouth for any particular work. He had no further orders. As the plaintiff put it in argument, his orders were to do the required work and come home. Upon this evidence it could well be found that the return trip was an incident to the work done on the trip to the Summit, and that therefore the plaintiff was engaged in interstate commerce at the time of the accident.

Exception overruled.

Plummer, J., was absent. The others concurred.

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COURT OF ERRORS AND APPEALS OF NEW JERSEY.

KROOG

v.

KEYSTONE DAIRY CO. (No. 19.)*

MASTER AND SERVANT — WORKMEN'S COMPENSATION —REVIEW—QUESTION OF FACT.

Where the judgment of the common pleas court is supported by the evidence, it is, under the statute, conclusive and binding upon questions of fact.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

Parker and Williams, JJ., dissenting.

Appeal from Supreme Court.

Proceedings under the Workmen's Compensation Act (P. L. 1911, p. 134, as amended by P. L. 1913, p. 309) by Elizabeth Kroog against the Keystone Dairy Company, to recover compensation for the death of her husband, Henry Kroog. From a judgment of the Supreme Court affirming a judgment of the common pleas court in favor of plaintiff, defend- and appeals. Judgment affirmed.

On appeal from the Supreme Court, in which the following per curiam was filed:

"This is a workmen's compensation case heard in the Hudson county court of common pleas, resulting in a determination in favor of Elizabeth Kroog, widow of Henry Kroog. Henry Kroog was a salesman and driver of one of the defendant's wagons. On the 8th of September, 1916, he was killed while driving a horse and wagon onto a weighing scale at the ice depot belonging to the Mountain Ice Company at Ferry street and Ravine road at the Erie Railroad in Jersey City. As he was driving onto the scale, he was standing up in the wagon, and was heard to say, "Whoa," suddenly; the horse stopped, and the decedent was accidently thrown or fell out of the wagon onto the ground, his head striking an iron rail at the side of the scale, causing death. The defense was that his death was the result of natural causes, such as heart failure. This is the only point in the case. The judgment of the common pleas court is supported by the evidence, and this, under the statute, on questions of fact, is conclusive and binding. The judgment of the common pleas court is affirmed, with costs.

M. Casewell Heine, of Newark, for appellant.
William R. Gannon, of Jersey City, for respondent.

PER CURIAM. The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

*Decision rendered, Feb. 6, 1919. 106 Atl. Rep. 28.

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SUPREME COURT OF PENNSYLVANIA.

CARTIN

v.

STANDARD TIN PLATE CO.*

MASTER AND SERVANT—DECISION OF WORKMEN'S COMPENSATION BOARD—FACT OR CONCLUSION—REVIEW.

The findings of a referee, affirmed by the Workmen's Compensation Board, that the condition of claimant's hands as the result of the accident constituted a permanent loss of their use within Workmen's Compensation Act, art. 3, § 301, was a fact found, and not a conclusion of law reviewable on appeal.

(For other cases, see Master and Servant. Dec. Dig. § 417[3¼].)

Appeal from Court of Common Pleas, Washington County.

Claim under the Workmen's Compensation Act by Charles Cartin against the Standard Tin Plate Company. From an order dismissing an appeal from decision of Workmen's Compensation Board allowing the claim, defendant appeals. Appeal dismissed.

Appeal from Workmen's Compensation Board.

McIlvanie, P. J., in the court of common pleas, filed the following opinion:

"As we view the Workmen's Compensation Board, it is, in effect, a tribunal chosen by the parties to settle a dispute between them, its award to be final and conclusive unless the award as made is in violation of some law or is obtained by fraud. This court has jurisdiction to review the award of the board, fairly and honestly made, only when the validity or binding effect of the same turns upon a question of law. In other words, the findings of fact, the weight that has been given those facts as a controlling factor in the formation of the final judgment of the board, and the amount of compensation allowed, are prima facie final and conclusive between the parties, and the burden is on the appellant, in case of an appeal, to convict the board of such an error in law as will vitiate its award. Has the appellant in this appeal done that? We think not.

"There is and can be no dispute as to the extent of the physical injury to the claimant's hands, respectively; as to the kind of work that he had learned to perform and could do at the time of the accident; or as to the amount of wages he could and was earning with his hands when they were injured.

"The contention in this case arises over the question how this admitted injury of the hands affected their use in doing the work that he had previously been able to do. The claimant's counsel contend that the determination of this question is the finding of a fact, while the defendant's counsel contends that its determination is the decision of a question of law. If the claimant's contention is correct, then this court has no power to review, modify, or set aside the findings of the referee on this question; it having been affirmed by the board of compensation.

"The finding complained of is as follows: "That the condition of the claimant's hands, as the result of said accident, constitutes a permanent loss of the use of such members; that in his present condition he

*Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 63.

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is unable to perform the work which he was engaged in at the time of the accident, nor can he perform the duties of a street car conductor, motorman, or railroad baggageman with which he has had experience."

"This court cannot say as a matter of law that the board manifestly erred in holding 'that the condition of the claimant's hands, as the result of said accident, constitutes a permanent loss of the use of such members,' and 'that the injuries resulting from said accident were such violence to the physical structure of the body as is contemplated in section 301, art. 3, of the Workmen's Compensation Act (Act June 2, 1915 [P. L. 738]), and resulted in total permanent disability, being suffered in the course of the claimant's employment by the defendant company.'

"In deciding this question it must be remembered that the Workmen's Compensation Act of 1915 gives to the board thereby created certain discretion and freedom of judgment in making a settlement between an employer and an employee, and an exercise of that discretion and freedom of judgment in good faith will not be reviewed by this court; such a review being allowed only when the settlement is contrary to law or an error of law has been made by the board which vitally affects that settlement.

"How can it be said that the board committed an error in law because it did not adopt the theory of the witness, Dr. McCurdy, that the claimant's present disability to work with his hands would, by practice or a systematic training of the parts of his hands that were not cut off, hereafter to a certain extent disappear? The claimant testified that he could not use his hands to do any kind of work. The board had a right to look at the present condition of the claimant and pass its judgment thereon, leaving the future developments to be passed upon at a rehearing if the defendant could show that this improvement—probable at the time of the hearing—had actually taken place. The award provides for a weekly payment of $10, to continue not exceeding 500 weeks, and in an amount not exceeding $4,000, as provided in article 3, § 306, cl. 'a' of the Compensation Act, and the practice before the board to give rehearings where necessary is well established. Indeed, in the case at bar, counsel aver that Chairman Mackey in his opinion said: 'At present the claimant is totally disabled, but he is young and might in time develop a degree of skill and might find some work to which he could adopt himself, and in either of these events the board could entertain a petition to reopen the case and compensate him according to section 306, clause, "c," which would be 175 weeks for each hand,' making the aggregate of the two periods 350 weeks in place of a maximum of 500 weeks.

"To summarize, we hold:

"1. That the findings of fact in this case as affirmed by the Board of Compensation, in the absence of fraud, coercion, or any improper conduct, are final.

"2. That the findings of the referee, affirmed by the board, 'that the condition of the claimant's hands, as the result of said accident, consitutes a permanent loss of the use of such members,' is a fact found and not a question of law decided such as this court can review, modify or reverse upon appeal.

"3. That the defendant's remedy at this date, if it has any, is a petition to the board for a rehearing and not an appeal."

"5. That the settlement made in this case does the appellant no injustice and is not and was not made contrary to law."

Argued before Stewart, Moschzisker, Frazer, Simpson, and Fox, JJ.

George C. Bradshaw, John C. Sherriff, and Alexander P. Lindsay,

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all of Pittsburgh, and Erwin Cummins, of Washington, Pa., for appellant.

Adolph L. Zeman, of Pittsburgh, for appellee.

PER CURIAM. The question here sought to be raised was clearly one of fact, not of law, and the learned court very properly decided that into such controversy it could not enter. Poluskiewicz v. Philadelphia & Reading Coal & Iron Co., 257 Pa. 305, 101 Atl. 638, is a case in point.

Appeal dismissed at appellant's cost.

SUPREME COURT OF PENNSYLVANIA.

FLUCKER

v.

CARNEGIE STEEL CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE.

The referee in proceedings under Workmen's Compensation Act June 2, 1915, should make his findings of fact so comprehensive and explicit as to disclose the full story of the accident, but legal precision cannot be insisted upon.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE—APPEAL TO WORKMEN'S COMPENSATION BOARD.

Workmen's Compensation Act June 2, 1915, contemplates brevity in matters of practice, but if referee fails to pass upon any material matter of fact in evidence which either party considers vital in event of an appeal to court, those affected should apply to compensation board for assistance on a hearing de novo, in view of article 4, § 421.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS AND CONCLUSIONS—REVIEW.

Where referee found that deceased reached his place of work in time to resume work during regular working hours, the conclusion of fact as to manner of his death was for compensation authorities, and, when made by the referee and affirmed by the board, was not reversible by court of common pleas.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REFEREE'S FINDINGS—CIRCUMSTANTIAL EVIDENCE.

In proceedings under Workmen's Compensation Act June 2, 1915, a referee's conclusion as to the manner of an employee's death may be based on circumstantial evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

*Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 192.

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5. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS AND CONCLUSIONS—REVIEW.

As Workmen's Compensation Act June 2, 1915, art. 3, § 301, defines "injury by an accident in the course of his employment," the question of law is whether underlying findings of fact are sufficient to bring case within such definition, but that does not warrant court's interference with such findings.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY IN COURSE OF EMPLOYMENT—INFERENCE.

When an employee's body is found on employers premises at or near his regular place of work under circumstances indicating accident during his hours of work, it may be fairly inferred that he was injured in course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING—CONCLUSION.

Where the tribunal charged with finding facts has considered all attending circumstances, as against presumptions arising out of other facts favoring claimant, a controlling finding that employee was killed in particular manner, reasonably indicated by circumstances found, cannot be reversed as being without support upon the record.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE—REVIEW.

When the referee's adjudication contains underlying findings of fact which either negative or fail to support his ultimate findings, an error of law is presented which may be reviewed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

Appeal from Court of Common Pleas, Allegheny County.

Proceeding by Mary A. Flucker against the Carnegie Steel Company. From an order reversing a decision of the Workmen's Compensation Board, sustaining a referee's award, plaintiff appeals. Judgment reversed, and order of referee, approved by the Workmen's Compensation Board, affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Walling, Simpson, and Fox, JJ.

H. J. Nesbit and A. H. Mercer, both of Pittsburgh, for appellant.

John G. Frazer and Reed, Smith, Shaw & Beal, all of Pittsburgh, for appellee.

MOSCHZISKER, J. Henry Flucker, a man in good health, 55 years of age, was employed in the Carnegie Steel Company's Pittsburgh plant. At the time of the accident, he was working on night turn, beginning his daily service at 6 o'clock p. m. and quitting at 6 a. m. It was his duty to look after two pumping stations, 350 feet apart, one being on what is known as the 'Carnegie side" and the other across a small ravine, about 18 feet deep and 20 feet wide. To enable defendant's employees to go from one side of this ravine to the other, it is spanned by a footbridge, "about 36 or 40" inches wide, with a railing at either side 3 feet in height. A railway trestle is likewise constructed over the opening, below the footbridge, and this also could be used by pedestrians as a crossway. Plain-

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tiff's husband, in the performance of his duties, was required to remain at the pumping station on the Carnegie side the greater part of the time; but, about every three hours, he would have to go to the opposite station. On the evening of February 11, 1917, Flucker reported at the Carnegie station a little before 6 o'clock, and remained until about 8 p. m., then he went to his home, stayed there until some time between 10 and 11 o'clock, when he started back to his place of work. He had "drunk some" previous to reporting at the plant, but "was not under the influence of liquor when he arrived at work at 6 o'clock." After leaving home to return to work, he was not again seen until the next day, when his dead body was found in the ravine, about 8 feet below the footbridge, but above the railway trestle, with injuries on the trunk, hands, and back of the head. The night in question was exceedingly cold, and some snow and ice were on the trestle and ground; but the footbridge had been cleared thereof the previous day.

The proceeding was under the Workmen's Compensation Act (P. L. 736). After finding the foregoing material facts, and inferring therefrom that "the deceased fell into this sewer [or ravine] some time during the night, while attempting to cross either the footbridge or trestle," the referee concluded that "the deceased met his death from injuries received by accident occurring in the course of his employment with the defendant company," and awarded compensation to his widow and children. An appeal was taken to the compensation board, which sustained the award; whereupon the case was removed to the common pleas of Allegheny county, which tribunal reversed, deciding that the record presented no sufficient support for the referee's inference as to the manner of the injury which befell the deceased, or for the conclusion that he met with death while in the course of his employment. The claimant appealed to this court.

[1] The compensation act, to realize the success which it deserves, must be administered, like any other system for adjusting rights, between man and man, in a manner calculated to do, as nearly as humanly possible, exact justice to all concerned; and, as recently said by this court in Gurski v. Susquehanna Coal Co., 262 Pa. 1, 104 Atl. 801 "the referee should make his findings of fact so comprehensive and explicit as to disclose the full story of the accident." Under this statute, however, those charged with the grave responsibility of finding the facts are not required to be learned in the law, and, in many cases, they lack the assistance of trained practitioners; hence the same precision in their adjudications as otherwise might be looked for, expected, and required, cannot be insisted upon.

[2] The act contemplates brevity and simplicity in all matters of practice; but, if a referee entirely fails to pass upon any material matter of fact, covered by the evidence, which either side considers, in event of an appeal to the courts, may be vital to its case, those affected should apply to the compensation board for assistance in that respect, on a hearing de novo. See section 421, article 4, Act of June 2, 1915 (P. L. 736, 753); Mc Cauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617.

[3] The underlying findings in the present case, considering the circumstances, are reasonably full and explicit; and they by no means call for the conclusion, reached by the court below, that claimant's husband had abandoned his work for the night when he went to his house. On the contrary, the express finding of the referee is that Flucker subsequently "left his home to go back to his place of work"; and other findings upon the record suggest that, considering the hour of departure from his residence, he must have reached defendant's plant in ample time to resume his usual occupation during his regular working hours.

There is an indication upon the record that suicide was suggested before the referee as a possible defense; but article 3, § 301, of the act (P. L. 738), expressly provides the "burden of proof of ['intentionally self-

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inflicted' death] shall be upon the employer"; and no finding here supports any such theory. Under the circumstances of this case, as disclosed by the record before us, the conclusion of fact as to the manner of Flucker's death was for the compensation authoritiess to draw, and, when made by the referee and affirmed by the board, it was not subject to reversal by the court below. Poluskiewicz v. Philadelphia & R. C. & I. Co., 257 Pa. 305, 101 Atl. 638.

[4] We may add that, while the present conclusion, as to the manner of death, rests upon circumstantial evidence, there having been no eyewitnesses to the actual occurrence, yet this is by no means unusual. As recently stated by us in Weinschenk v. Philadelphia Homemade Bread Co., 258 Pa. 98, 101 Atl. 926:

"There was no eyewitnesses to the accident; but that situation is present in many cases where verdicts for the plaintiff have been affirmed, among others: Philadelphia & R. R. R. Co. v. Huber, 128 Pa. 63 [18 Atl. 334, 5 L. R. A. 439]; Henderson v. Continental Ref. Co., 219 Pa. 384 [68 Atl. 968, 123 Am. St. Rep. 668]; Millum v. Lehigh, etc., Coal Co., 225 Pa. 214 [73 Atl. 1106]; Tucker v. Pittsburgh, Cin., C. & St. L. Ry. Co., 227 Pa. 66 [75 Atl. 991]; McManamon v. Hanover Twp., 232 Pa. 439 [81 Atl. 440]; Madden v. Lehigh Valley Valley R. R. Co., 236 Pa. 104 [84 Atl. 672]; Daniels v .Sylvania Twp., 255 Pa. 156 [99 Atl. 475]."

[5] As to the ultimate conclusion, upon which the award rests, that "deceased met his death from injuries received by accident occurring in the course of his employment with the defendant company," it is contended by appellant that this presents a mixed question of fact and law, which may be reviewed on its latter aspect. In a measure, the contention is sound, for, since the compensation act undertakes to define the meaning of the phrase "injury by an accident in the course of his employment" (see section 301, art. 3, P. L. 738, 739), in each instance the question of law is presented as to whether or not the underlying findings of fact are sufficient to bring the case within the statutory definition; but this, however, does not warrant any interference by the courts with those findings, whether they be based on proved facts or inferences therefrom. Poluskiewicz v. Philadelphia & R. C. & I. Co., supra.

[6] Where no facts appear indicating anything to the contrary, it may be presumed logically that an employee at his regular place of service, during his usual working hours, is there in discharge of some duty incident to his employment; and, when the dead body of an employee is found on the premises of his employer, at or near his regular place of service, under circumstances fairly indicating an accidental death which probably occurred during the usual working hours of the deceased, the inference may fairly be drawn, in the absence of evidence to the contrary, that the employee was injured in the course of his employment. Such is the case at bar.

[7] Of course, the burden is always upon a claimant to prove his case, and the tribunal charged with the duty of finding the facts must weigh and consider all attending circumstances, in order to determine how far they should prevail against presumptions arising out of other facts favoring the claimant; but, when this course has been pursued, a controlling finding that an employee was killed in a particular manner, reasonably indicated by the circumstances shown in the underlying findings, cannot properly be held to be without support upon the record.

[8] Where, however, the adjudication of the referee contains underlying findings of fact which either negative or fail to support his ultimate, or controlling, findings, an error of law is presented, which may be reviewed on appeal. For instance, suppose, in the case at bar, the referee had found that deceased left defendant's plant, against the latter's protest, and that his dead body had subsequently been discovered, not on the premises of his employer, but in the yard of his own home; on such underlying findings, the conclusion now complained of could and would

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be reversed, for the record itself would demonstrate its utter lack of essential support.

Here, however, so far as the subordinate findings are concerned, there is nothing to convict either the referee or the compensation board of an abuse of the power vested in them by the Act of June 2, 1915, P. L. 736, to deal with issues of fact; and the court below erred in holding as a matter of law that the record presents no sufficient support for the controlling findings or conclusions on which the award rests.

The judgment of the common pleas is reversed, and the order entered by the referee, and approved by the compensation board, is affirmed.

SUPREME COURT OF PENNSYLVANIA.

DAINTY

v.

JONES & LAUGHLIN STEEL CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE.

The mere fact that each finding of a referee in proceedings under the Workmen's Compensation Act is not formally labeled as a finding of fact or conclusion of law in no way changes their actual character.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE—CHARACTER.

Where a series of facts are found showing, in themselves, that an employee was injured on employer's premises, the lack of a formally stated conclusion that injury so occurred is not fatal to referee's adjudication.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS AND CONSLUSIONS—REVIEW.

Where referee and compensation board, after considering all circumstances, concluded that deceased had neither been discharged nor quit his job, it was reversible error for court of common pleas, on appeal, to set aside such decision.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Common Pleas, Allegheny County.

Proceeding by Hattie Dainty against the Jones & Laughlin Steel Company. From an order setting aside an award of the Workmen's Compensation Board affirming findings of a referee, plaintiff appeals. Judgment of common pleas reversed, and order of referee, approved by the compensation board, affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Fox, JJ.

* Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 194.

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Luther W. Mendenhall and H. Fred Mercer, both of Pittsburgh, for appellant.

Clarence Burleigh, William A. Challener, and Frank McC. Painter, all of Pittsburgh, for appellee.

MOSCHZISKER, J. F. E. Dainty was employed by the Jones & Laughlin Steel Company, as a locomotive engineer. On February 24, 1917, he reported for work at the usual hour, and started his engine. Subsequently he left the locomotive in charge of a fireman who operated it for several trips, Dainty in the meantime retiring to a nearby shanty on his employer's premises. "While there the assistant general labor foreman and yardmaster, Mr. Thompson, spoke to him and asked what was the matter, and if he had too much pay day. He responded, 'No, not exactly, that he was mad at himself and everybody else.' Mr. Thompson then said, 'If that is the way you feel, you had better take a night off.' He replied, 'All right,' but still remained about the premises, and about 7:30 or 7:45 the crew started to spot furnaces Nos. 2 and 4, of which fact the deceased was informed, * * * and Robert Groves, one of the crew, climbed on the engine and the deceased climbed out on the footboard of the engine, or one of the ladles, and, during the trip, in some way fell to the tracks, the ladles passing over his body, severing the head and mangling the body, resulting in instant death. When found, his watch, which had been broken, had stopped at 18 minutes to 8 o'clock."

The proceeding was under the Act of June 2, 1915, (P. L. 736) and, on the foregoing findings, inter alia, the referee made an award of compensation to the widow and children of the deceased. An appeal was taken to the compensation board, on questions of fact, and, in affirming, Commissioner Scott, speaking for the board, states:

"The referee has found as a fact that, at the time the employee suffered the injury, he was in the course of his employment and engaged in the furtherance of the business or affairs of his employer, on the employer's premises. The assistant labor foreman, S. E. Thompson, had a conversation with Dainty, some time before the accident, and, from what passed between them at the time, it is contended by defendant that Dainty was dismissed from his employment for the night, that the relation of employer and employee was suspended for the time at least, that he was not in the course of his employment, as contemplated by the act, when killed, and the claimant is not entitled to compensation as dependent widow. Whether there is sufficient evidence to sustain the finding by the referee is the decisive matter in the case. When all the testimony bearing on the question of the employee's alleged dismissal by the labor foreman is fully considered, we think there is sufficient evidence in the record to sustain the finding."

An appeal was then taken to the common pleas of Allegheny county, which tribunal reversed the compensation board, stating:

"To make a successful claim under the act the relation of employer an employee must have existed at the time of the accidental injury The plain deduction from the conversation between the deceased and the assistant general labor foreman and yardmaster, included in the findings of fact, is that, prior to the accident, he had been discharged for the night by his superior officer, * * * and that he had acquiesced in and accepted the discharge; having been discharged, it was his duty to promptly quit the premises. * * * The referee erred in concluding, as a matter of law, from the findings, that the death of plaintiff's husband occurred in the course of his employment, and * * * the board erred in dismissing the plaintiff's appeals and confirming the award of the referee."

[1, 2] The compensation board properly disposed of this case, and its adjudication should have been affirmed by the court below. The ultimate findings and conclusions of the referee are, in substance, correctly reported by Commissioner Scott, and the mere fact that each finding of

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the referee is not formally labeled by him as a finding of fact or conclusion of law in no way changes their actual character; again, where a series of facts are found, showing, in themselves, that an employee was injured upon the premises of his employer (as in the present case), the lack of a formally stated conclusion that the injury so occurred is not fatal to the referee's adjudication. As just stated in Flucker v. Carnegie Steel Co., 106 Atl. 192 (decided simultaneously herewith):

"Under the [compensation] act, those charged with the grave responsibility of finding the facts are not required to be learned in the law, and, in many cases, they lack the assistance of trained practitioners; hence the same precision in their adjudications as otherwise might be looked for, expected, and required, cannot be insisted upon."

[3] The controlling question concerns the alleged discharge of Dainty prior to the accident which caused his death, and the answer to that involves the determination of pure issues of fact. The compensation authorities, whose particular province it is to find the facts, after considering what was said and done at the time of the alleged dismissal, together with all the attending circumstances, concluded that deceased had neither been discharged from nor quit his job; on a consideration of the underlying findings, it could not properly be held that this conclusion was utterly lacking in support, and the learned court below stepped beyond its authority under the statute, when it undertook to reach a contrary conclusion.

The issue of the alleged discharge being decided against the employer, the conclusion, on the other findings in the case, that the deceased met an accidental death during the course of his employment with defendant company, follows as a matter of course; hence the court below erred in setting aside such conclusion and substituting therefor its own "deduction."

The judgment of the common pleas is reversed and the order of the referee, approved by the compensation board, is affirmed.

SUPREME COURT OF PENNSYLVANIA.

HADDOCK

v.

EDGEWATER STEEL CO. ET AL.*

1. MASTER AND SERVANT—"COURSE OF EMPLOYMENT"—WORKMEN'S COMPENSATION ACT.

A mechanical engineer, employed on a salary with no fixed hours of service, who had been directed to go to another city for information for use in employer's business, and who on his return, after 11:30 p. m. and while going from station to his home before reporting was killed by an automobile, was injured in the "course of his employment," within Workmen's Compensation Act June 2, 1915, art. 3, § 301.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

*Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 196.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL.

In considering whether findings reported by a referee are sufficient to bring a case within term "course of employment," contained in Workmen's Compensation Act June 2, 1915, art. 3, § 301, the Supreme Court will keep in mind the liberal construction placed on such statutory definition and the power of the compensation authorities to find the facts from direct proof, circumstantial evidence or inference.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Common Pleas, Allegheny County.

Proceeding by Clarissa T. Haddock against the Edgewater Steel Company, and the Maryland Casualty Company, insurance carrier, for damages for the death of Edwin J. Haddock, a mechanical engineer in the employ of the steel company. From an order dismissing an appeal from an award of the Workmen's Compensation Board, defendants appeal. Affirmed.

Argued before Brown, C. J., and Stewart, Moschizisker, Walling, Simpson, and Fox, JJ.

Robert A. Applegate, of Sewickley, and Rose & Eichenauer, of Pittsburgh, for appellants.

L. Pearson Scott and A. Leo Weil, both of Pittsburgh, for appellee.

MOSCHZISKER, J. Edwin J. Haddock, an engineer by profession, employed on a salary, with no fixed hours of service, by the Edgewater Steel Company, defendant, at its plant in Allegheny county, was instructed by the president of that corporation to go to Lowellville, Ohio, and examine the natural gas burners in the open hearth furnaces of the Youngstown Iron & Steel Company, for the purpose of obtaining information to be used in the construction of similar burners in defendant's works. In pursuance of these instructions, Haddock left Pittsburgh at midday, April 6, 1917, and arrived at his destination that afternoon. He made the required examination, and returned to Pittsburgh, by railroad, the same evening. About 11:30 p. m., while on the way to his residence in the latter city, he was accidentally struck by an automobile, at a street crossing, which casualty resulted in his death. Defendant company had sent deceased previously on like trips.

After finding the material facts just stated, the referee concluded that, at the time Haddock sustained the injury which caused his death, "he was in the course of his employment with the defendant company within the meaning of section 301 of article 3 of the Workmen's Compensation Act of June 2, 1915 (P. L. 738)," and awarded compensation to his widow, the claimant.

The defendant and the Maryland Casualty Company, insurance carrier, both appealed to the Workmen's Compensation Board, which affirmed the referee. From this decision an appeal was taken to the court of common pleas of Allegheny county, which affirmed the board. The present appeal followed.

[1] As correctly stated by Chairman Mackey of the compensation board, in his opinion sustaining the award:

"The deceased was not an ordinary day laborer, whose duties ceased upon the blowing of a whistle and leaving the employer's premises, but was a skilled and technical employee receiving sufficient compensation to enable the employer to call for his contribution of expert knowledge any hour of the day or night. He was commissioned to go to another city to transact business of importance for his employer. He surely was in

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the course of his employment at the conclusion of that day's engagement when he was taken to a train near Youngstown for the purpose of returning to Pittsburgh. No one could deny that he was in the course of his employment when on the train for his destination—Pittsburgh. It was necessary for him to arrive there at night; had he gone directly from the railroad station to Oakmont, the site of the employer's plant, no one would deny that, while on this journey, he was still in the course of his employment. Who, then, can deny that he was in the course of employment when, having arrived at Pittsburgh late at night, he did the usual, ordinary, and reasonable thing in going to his home before he reported to his employer?"

This is not the case of an employee injured, after regular working hours, on the way to his home; and we agree with the court below that there is nothing upon the record to show Haddock had, at the time of the accident, "ceased to be active in the furtherance of his employer's business." True, the facts as found indicate that plaintiff's husband intended stopping at his own residence, to sleep for the night, before reporting the results of his trip of investigation to the president of the defendant corporation; but, none the less, he was still upon his employer's errand and, in that sense, actually engaged in the furtherance of the latter's business or affairs. Since deceased was compelled to return to the city at an hour when he could not at once communicate with his superior, and had to stay somewhere until he could report, he cannot be charged with a departure from his employer's service because, when hurt, he was going to his home for a lodging, rather than to an hotel; hence the findings of the referee are ample to sustain the ultimate conclusion upon which the award of compensation rests, to the effect that plaintiff's husband met his death by accident during the course of his employment with the defendant company.

[2] In considering the legal aspect of the question, whether or not the underlying findings reported by the referee are sufficient to bring the case within the definition of the phrase "course of employment," contained in section 301, art. 3, of the compensation act, we have kept in mind the liberal construction placed upon the words of such statutory definition by this court in Dzikowska v. Superior Steel Co., 259 Pa. 578, 103 Atl. 351, L. R. A. 1918F, 888, and the right and power vested in the compensation authorities to find the facts, whether from direct proof, circumstantial evidence, or by inference from other facts. See Flucker v. Carnegie Steel Co., 106 Atl. 192, not yet officially reported.

The judgment of the court below is affirmed.

SUPREME COURT OF PENNSYLVANIA.

McCARL ET AL.

v.

BOROUGH OF HOUSTON.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF FACT—REVIEW.

Under Workmen's Compensation Act June 2, 1915 (P. L. 736),

*Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 104.

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the courts cannot review the findings of fact of the referee and the Workmen's Compensation Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AWARD TO WIDOW—RIGHTS OF CHILDREN.

Under Workmen's Compensation Act June 2, 1915 (P. L. 736), if an award to a widow ceases before decedent's children reach 16 years of age they are entitled to compensation until they reach that age.

(For other cases, see Master and Servant, Dec. Dig. § 393.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"EMPLOYEE"—POLICEMAN.

Under Workmen's Compensation Act June 2, 1915 (P. L. 736) §§ 103, 104, defining "employer" as synonymous with master and to include municipal corporations, and "employee" as synonymous with servant, and in view of section 106, a borough policeman is an "employee" of the borough within the act.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from Court of Common Pleas, Washington County.

Proceeding by Elizabeth McCarl and others against the Borough of Houston for compensation under the Workmen's Compensation Act. From an order dismissing exceptions to award of Workmen's Compensation Board and entering judgment for claimants, defendant appeals. Affirmed.

Argued before Stewart, Moschzisker, Frazer, Simpson, and Fox, JJ.

George C. Bradshaw, John C. Sherriff, and Alexander P. Lindsay, all of Pittsburgh, and Erwin Cummins, of Washington, Pa., for appellant.

R. W. Knox and R. James Knox, both of Washington, Pa., for appellees.

SIMPSON, J. James A. McCarl, a police officer of the borough of Houston, was kicked in the abodmen by a criminal he was arresting, and as a result thereof died the next day. His widow and three minor children made claim under the Workmen's Compensation Act of June 2, 1915 (P. L. 736). The borough resisted the claim. The referee and Workmen's Compensation Board made an award to her covering a period of 300 weeks, and to the minor children after that date and until they severally reached 16 years of age. The borough appealed, alleging insufficient evidence to sustain the findings as to the average weekly wages of the deceased; that the award to the widow was all that legally could be made; and that a police officer was not an employee within the meaning of the act. The court below dismissed the appeal and entered judgment for the claimants, and therefrom the present appeal is taken.

[1, 2] We decided, in McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617; and the cases in its train, that the courts cannot review the findings of fact of the referee and Workmen's Compensation Board; and in Catlin v. Pickett & Co., 262 Pa. 351, 105 Atl. 503, that an award to a widow does not preclude an award also to decedent's minor children, to commence when the award to the widow ceases, and continue until the children reach sixteen years of age. Those decisions dispose of the first two questions raised. The third, however, has never been decided by

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this court, and the decisions of the courts of common pleas are conflicting.

[3, 4] Sections 103 and 104 of the act provide as follows:

"Sec. 103. The term 'employer' as used in this act is declared to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the commonwealth, and all governmental agencies created by it.

"Sec. 104. The term 'employee' as used in this act is declared to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in the worker's own home, or on other premises not under the control or management of the employer."

It is argued by appellant that a policeman is not ordinarily considered a "servant," and hence, as "employee" is synonymous with "servant," a policeman is not an "employee," and the borough is not required to make compensation under the act. But that argument begs the question, and also reasons in a circle. It assumes that a policeman is not a servant within the meaning of the act, although that is the very question to be determined. It reasons in a circle, because, if the two words are synonymous, then every servant is an employee, and every employee is a servant; and hence, as we give prominence to one or the other synonym (though neither is entitled to prominence over the other), we determine that a policeman is or is not entitled to the protection of the act.

Moreover if the ordinary meaning of the word "servant" is to be applied, then "municipal corporations, the commonwealth, and all governmental agencies created by it" would be without the act, for none of those engaged in such service are called servants, or popularly considered as such. They are all called officers or employees. Yet section 103, above quoted, includes all those public bodies. Hence, as we must so construe the act as to give effect to all of the words, we must assume that the word "servant" is not to be given the meaning suggested by appellant. And this conclusion is borne out also by section 106 of the act, which provides that—

"The exercise * * * of the powers and duties of a local or other public authority shall, for the purposes of this act, be treated as the trade or business of the authority."

The error into which appellant falls is in overlooking the fact that we are now dealing with a statutory definition of the terms used, and that we cannot import into them a dictionary definition thereof, especially as we would thereby exclude from the statutory definition those who are thereby expressly included within it. The statute does not define the word "employer" by the word "master," nor the word "employee" by the word "servant," and sent us to the dictionary to find what "master" and "servant" means. It says that the word employer as used in the act is synonymous with master and includes, inter alia, municipal corporations, in this case the borough of Houston; and that employee as used in the act is synonymous with servant, "and includes all natural persons who perform services for another for a valuable consideration," in this case the policeman, James McCarl. Hence, under the definitions of the act, the borough and James McCarl were employer and employee; and as he met his death by an accident, in the course of his employment, his widow and children are entitled to compensation, under the act.

The judgment is affirmed.

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SUPREME COURT OF PENNSYLVANIA.

MESSER

v.

MANUFACTURERS' LIGHT & HEAT CO. ET AL.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—"INJURY BY ACCIDENT IN COURSE OF EMPLOYMENT"—"FURTHERANCE OF BUSINESS OF EMPLOYER."

Where engineer during his vacation, but while in pay of and subject to employer's call, at request of its superintendent went to inspect a pumping station, to increase his efficiency as an employee, and was injured in automobile accident on his journey or his way homeward, his widow was entitled to damages for his death as an "injury by accident in the course of his employment" and while "actually engaged in the furtherance of the business or affairs of the employer," within Workmen's Compensation Act, art. 3, § 301.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment; Second Series, Furtherance of Business.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS—CONCLUSIVENESS.

A finding of the referee adopted by the Workmen's Compensation Board is absolutely conclusive upon the Supreme Court.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Court of Common Pleas, Washington County.

Proceeding by Frances Messer against the Manufacturers' Light & Heat Company and the Hartford Accident & Indemnity Company, the insurance carrier, for compensation under the Workmen's Compensation Act. From an order sustaining exceptions to decision of Workmen's Compensation Board sustaining an award of the referee, claimant appeals. Reversed, and judgment entered in favor of claimant for the amount of the award.

Argued before Stewart, Moschzisker, Simpson, and Fox, JJ.

Victor Braddock, of Harrisburg, and H. D. Hamilton and Clyde S. Pipes, both of Washington, Pa., for appellant.

John G. Frazer and Reed, Smith, Shaw & Beal, all of Pittsburgh, for appellees.

Fox, J. Hiram Messer, the husband of Frances Messer, the appellant, was an engineer in the employ of the Manufacturers' Light & Heat Company at the pumping station at Waynesburg. He had been so employed for about three years prior to his death. On the 11th day of July, he began his regular vacation of ten days, during which time he was subject to be called for service if needed and was paid his usual salary. On the 12th of July, William Nester, the superintendent of the company, called him by telephone and requested him to go to the Brave Pump Station, a place about 18 miles distant from Waynesburg, to inspect this

*Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 85.

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station. The purpose of this instruction by Mr. Nester was to increase the efficiency of Messer as an employee of the company and to educate him as to the best method of conducting a pumping station.

Complying with this request, Messer left his home in Waynesburg in his own automobile accompanied by one Loughman, an assistant engineer of the defendant company. While on the road Messer ran his automobile into a bridge over a creek where there is a sharp turn in the road, throwing Loughman against the windshield and injuring him so that he became unconscious. After this accident, Messer continued on the road for a short distance in the direction of the Brave Pump Station, and while attempting to turn his machine in some way lost control and the machine went over an embankment. It turned over falling upon him and crushing him so as to cause his death about 5 o'clock the same day. The appellant filed her petition as claimant for compensation under the Workmen's Compensation Act of 1915 (Act June 2, 1915 [P. L. 736]) and was awarded compensation by the referee, the facts being found as above stated. This award was sustained by the Compensation Board, and, on appeal by the defendant to the court of common pleas of Washington county, the award of the Workmen's Compensation Board was reversed and the case was dismissed. This appeal followed.

[1, 2] The sole question presented for determination is whether, under the facts above stated, Messer, the husband of the appellant, received the injury which resulted in his death in the course of his employment This must be determined under the language of section 301, art. 3, of the Workmen's Compensation Act of 1915 (P. L. 738), which, so far as it is material to this controversy, is as follows:

"The term 'injury by accident in the course of his employment,' as used in this article, * * * shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere."

The finding of the referee, which was adopted by the Workmen's Compensation Board and is therefore absolutely conclusive upon this court, was to the effect that Messer "was called by William Nester, superintendent of the defendant company, and requested to go to the Brave Pump Station and inspect the station at this place, which place was between 14 or 18 miles distant from where the deceased lived, and the purpose of the inspection being for the education of the deceased and the increasing of his efficiency in the service of the Manufacturers' Light & Heat Company; and in pursuance of this request the deceased started on the road to the Brave Pump Station for the purpose of making said inspection."

The referee also found that it was the "policy of the defendant company to have its employees inspect the different plants and various kinds of work for the purpose of education and better fitting themselves for the service of the company whenever they can do so on the company's time, and the request of the deceased on July 12, 1916, by Superintendent Nester was in pursuance of that policy."

Under the language of these findings, we feel that the referee and the Workmen's Compensation Board correctly determined the legal question when they found that the injury sustained by Messer was incurred while he was actually engaged in the furtherance of the business or affairs of his employer.

The learned judge of the court below in reversing the finding and refusing to allow the claim holds, first, that, inasmuch as Messer was attempting to turn his machine, this act took him out of the category of engaging in the employment, and therefore there could be no recovery. We cannot sustain this view. The referee does not find as a fact that Messer was actually returning home, nor does he find what the purpose was in returning home. The learned judge of the court below refers

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to the testimony of the widow in which she stated that her husband told her that he had broken some part of the machine when he ran against the bridge and that he was attempting to turn the machine in order to go back home. We cannot consider these facts in determining the legal question; but, even had they been found by the referee, it would not change our view of the law. If he found that his automobile was so injured by the first accident that it was necessary for him to return home, he still would have been acting under the orders of his superintendent. It is too narrow a construction of the law to say that, the instant he turned under such circumstances, he was no longer engaged in the furtherance of the business of his employer. In our view the fact that he was on his vacation is of no significance. He was subject to call, he was paid his salary during the time that he was on his vacation, and he received the request from the superintendent of his employer with which he complied. His compliance with this request continued from the time he left his home until he finally returned, and the fact that he was prevented from actually carrying out his purpose to go on his way to the Brave Pump Station did not alter his legal status. The test to be applied is: Did he go upon this mission voluntarily or because of the request of his superintendent? The referee finds that he went not only at the request of the superintendent, but in pursuance of the policy which the company followed with all its employees. He was therefore practically under orders and in the performance of his duty when he was injured. In the case of Haddock v. Edgewater Steel Co., 105 Atl. —— (not yet officially reported), we held that an engineer, who was sent to Ohio for a similar purpose and was injured on his return to Pittsburgh in the evening about 11:30 while on his way to his residence, must be regarded as still within the terms of the act and actually engaged in the furtherance of business or affairs of the employer. We think the decision in this case is controlling in the present case. For that reason it is unnecessary to discuss cases referred to by the learned judge of the court below in his opinion setting aside the award.

The judgment is reversed, and judgment is here entered in favor of the claimant for the amount of the award of the Workmen's Compensation Board entered April 16, 1917, together with the costs of this appeal.

SUPREME COURT OF PENNSYLVANIA.

PATER

v.

SUPERIOR STEEL CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION.

The Workmen's Compensation Act is a remedial statute and is to receive a liberal construction.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

*Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 202.

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2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT — CONSTRUCTION—EXTENT OF INJURY—"LOSS OF ARM."

Where injury necessitated amputation of arm below the elbow resulting in employee's permanent loss of use of his arm, he was entitled to compensation for loss of the arm, rather than for loss of hand, under Workmen's Compensation Act, § 306, which includes all cases of permanent loss of members mentioned therein without regard to point of amputation as well as in case of loss from injury not requiring amputation.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

(For other definitions, see Words and Phrases, First and Second Series, Loss of Limb.)

Appeal from Court of Common Pleas, Allegheny County.

Proceedings for compensation by Elmer Pater against the Superior Steel Company. From a judgment sustaining an order of the Workmen's Compensation Board affirming the award of a Referee, defendant appeals. Appeal dismissed, and award affirmed.

Argued before Brown, C. J., and Frazer Walling, Simpson, and Fox, JJ.

George Bradshaw and Charles F. Patterson, all of Pittsburgh, for appellant.

Allen Davis, of Pittsburgh, for appellee.

BROWN, C. J. The right arm of Elmer Pater, an employee of the Superior Steel Company, was caught in one of its rolls and badly crushed. Amputation followed, about an inch or three-fourths of an inch below the elbow. The referee found that—

"On account of the amputation of the forearm so near the elbow joint and from the restricted motion of the elbow due to infection and interference with the muscles that move the joint the claimant has lost the permanent use of the right arm for all practical purposes."

Under this finding he was awarded compensation for 215 weeks. From the award an appeal was taken, on the ground that the compensation should have been but for 175 weeks, for the loss of a hand. The award was affirmed by the compensation board. An appeal followed to the court below, and from its order, affirming the award, there is this appeal by the steel company.

[1,2] The question before us depends upon the proper construction of the following clauses in section 306 of the Workmen's Compensation Act of June 2, 1915, P. L. 736.

"For all disability resulting from permanent injuries of the following classes, the compensation shall be exclusively as follows: For the loss of a hand, fifty per centum of wages during one hundred and seventy-five weeks. For the loss of an arm, fifty per centum wages during two hundred and fifteen weeks. * * * Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm, and amputation at or above the knee shall be considered as the loss of a leg. Permanent loss of the use of a hand, arm, foot, leg, or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg, or eye."

The contention of appellant is that, as the arm was amputated between the elbow and wrist, the claimant lost only a hand under the statute, and was therefore entitled to compensation for but 175 weeks. The act is reme-

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dial and is to receive a liberial construction. Quinn v. Fidelity Beneficial Ass'n, 100 Pa. 382; Poor District of Huntingdon Township v. Poor District of New Columbus Borough, 109 Pa. 579; Commonwealth v. Shaleen, 215 Pa. 595, 64 Atl. 797; Jones v. Beale, 217 Pa. 182, 66 Atl. 254. But aside from this under the fact found by the referee, the express words of the statute called for the award made to the claimant. He had permanently lost the use of his arm. While the act declares that amputation at any point between the elbow and wrist shall, ipso facto, be considered the equivalent of the loss of a hand, it further provides, in the same clause, that permanent loss of the use of an arm shall be equivalent of its loss. This can have but one meaning, and that is the permanent loss of the use of an arm, with or without amputation, resulting from injuries sustained by a workman, shall be the equivalent of the actual loss of the arm. If in the present case there had been no amputation, but the arm had been so crushed as to hang permanently useless at the side of the claimant, could his right to compensation for 215 weeks, be questioned? The finding of the referee is that, as the result of the injuries which he sustained in the course of his employment, he has permanently lost the use of his arm, and the amputation which necessarily followed is not a determining factor in fixing the basis upon which compensation is to be allowed. This was the correct view of the learned court below, as expressed in the following construction which it placed upon the words of the statute:

"They were intended to cover or include all cases wherein there is a permanent loss of the use of the entire member mentioned in the act, without regard to the point of amputation, as well as cases wherein such loss is sustained from injuries not requiring amputation."

Appeal dismissed, and award affirmed.

SUPREME COURT OF PENNSYLVANIA.

RIDDELL

v.

PENNSYLVANIA R. CO.*

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RECEIPT OF BENEFITS FROM RELIEF ASSOCIATIONS—EFFECT.

Workmen's Compensation Act, June 2, 1915 (P. L. 736) art. 2, § 204, providing that, contracts to the contrary notwithstanding, receipt of benefits from relief associations shall not bar recovery of damages by action at law, applies only to accidents happening after January 1, 1916, as it materially limits substantive rules of law applicable to personal injury from negligence and announces a new public policy.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

Appeal from Court of Common Pleas, Butler County.

Trespass by James Lesile Riddell, by his next friend, James B. Riddell, against the Pennsylvania Railroad Company to recover damages for

*Decision rendered, Jan. 4, 1919. 106 Atl. Rep. 80.

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personal injuries. Verdict and judgment for plaintiff for $14,222.50, and defendant appeals. Reversed, and judgment entered for defendant.

Argued before Stewart, Moschzisker, Frazer, Simpson, and Fox, JJ.

Thomas H. Green, of Bulter, for appellant.
James M. Galbreath, of Butler, for appellee.

Moschziskr, J. [1] James L. Riddell, an employee, of the Pennsylvania Railroad Company, on June 4, 1912, when but 18½ years of age, made written application for membership in the latter's relief association, and was duly accepted. November 8, 1912, while engaged in the performance of his regular duties, he was seriously injured. October 24, 1914, suit was brought in the court below, plaintiff alleging that his injuries were due to neglignce by defendant. Upon the trial, Riddel expressly elected to proceed at common law and not under the federal statutes. Defendant proved, by documentary evidence, plaintiff's contract of membership with its relief association and that after the accident, he had accepted benefits therefrom, in accordance with the rules and regulations thereof, for a period covering almost two years, amounting in the aggregate to $527. On this proof defendant requested binding instructions in its favor, which were declined. Plaintiff recovered a substantial verdict upon which judgment was entered. Defendant moved for judgment n. o. v., and, upon its refusal, took this appeal.

Young Riddel was over 18 and under 21 years of age when he joined defendant's beneficial association, also at the time of the accident and during the period of his acceptance of benefits; but the Act of June 24, 1897, P. L. 204, provides:

"It shall be lawful for minors, who have attained the age of eighteen years, to make all needful contracts to become members of fraternal and beneficial societies lawfully organized and doing business under the laws of this commonwealth."

Defendant's association is such a society.

Had plaintiff been of full age when he accepted the relief benefits, under the then established law of Pennsylvania, this would have released his right to recover damages, and effectually barred his action; but the court below decided that, since he was then still a minor, notwithstanding the act of 1897, supra, and the terms of his contract of membership in defendant's relief association, his acceptance of such benefits could not have that effect. The correctness of his conclusion is the controlling question for decision on the present appeal.

It will be noticed that the act of 1897, supra, authorizes minors over 18 years of age, to make all "needful" contracts to enable them to become members of benficial associations. The word "needful" means "necessary, requisite, essential, indispensable," Soule's Dictionary of English Synonyms.

No one could become a member of the relief association of defendant company without entering into a written contract similar to the one executed by the plaintiff in this case, and this contract expressly provides that the acceptance of benefits from such association, "for injury or death, shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through" the member; but the court below decided, in substance, that, since the contract here in question did not pretend to, and could not validly, release damages for prospective personal injury, and since the act of 1897 did not expressly authorize minors to execute a release of damages at any time, even after an accident, the release depended upon in the present case could not prevail.

The conclusion of the court below practically deprives the act of

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1897, supra, of its real purpose, which is to give legal capacity to minors, over 18 years of age, to make contracts required of them in becoming members of fraternal and benficial societies; in other words, the plain intent of the act is to put such minors on a par with adults in respect to the class of contracts therein contemplated.

Long prior to the date of the statute under consideration, we had passed upon the effect of contracts such as the one we are now dealing with and held that there was nothing illegal or against public policy either in their terms or operation; moreover, we had especially sustained the validity of the provision as to the acceptance of benefits releasing damages, and determined, when in any suit it was shown that such benefits had been paid to and accepted by an injured plaintiff, the defendant would be entitled to binding instructions in its favor (see Johnson v. P. & R. R. R. Co., 163 Pa. 127, 29 Atl. 854; Ringle v. Penna. R. R. Co., 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628), all of which matters of law we must assume were known to the Legislature when it passed the enabling act of 1897, supra.

Counsel for plaintiff admits that the contracts in the Johnson and Ringle Cases, supra, were practically "identical in form" with the one before us; and, in fact, so far as the authorities show, this form seems to be a standard one used by all such beneficial associations, the validity thereof having been upheld in numerous jurisdictions. See 26 Cyc. 1096. All the cases seem to go on the same theory, that "it is not the signing of the contract, but the acceptance of benefits after the accident, which constitutes the release." 26 Cyc. 1097; Pennsylvania cases already cited; Reese v. Pa. R. R. Co., 229 Pa. 340, 343, 78 Atl. 851; Hogarty v. P. & R. R. R. Co., 255 Pa. 236, 245, 99 Atl. 741. Why does the acceptance of such benefits constitute a release? Because, and only because, the contract which one must sign in order to become a member of a railroad beneficial association (and which the Legislature of Pennsylvania, by the act of 1897, supra, gave the present plaintiff legal capacity to execute and become bound by) so provides. In other words, if it were not that the contract of membership expressly stipulates the acceptance of benefits, after an accident, shall operate as a release of the company's liability for damages, such acceptance would not have that effect; hence, since it was necessary for the plaintiff to sign the contract in order to become a member of the defendant's relief association, he is bound by its terms to the same extent as the adult members of that organization, and the court below erred in deciding otherwise.

[2, 3] In cases of personal injury arising through negligence, the Workmen's Compensation Act of June 2, 1915, P. L. 736, by section 204, art. 2, provides that contracts to the contrary notwithstanding the receipt of benefits from relief associations shall not bar recovery of damages by action at law. Of course, such a provision can be sustained only as an exercise by the Legislature of its right to declare the public policy of the state, and, in the present instance, it constitutes a pronouncement of public policy upon the subject in hand different from that previously announced in our cases; but, as stated by us in Enders v. Enders, 164 Pa. 266, 271, 30 Atl. 129, 27 L. R. A. 56, 44 Am. St. Rep. 598 (speaking of the validity of a contract), "Public policy, in the administration of the law by the courts, is essentially different from what may be public policy in the view of the Legislature"—with the latter it may be, and often is, nothing more than expediency"; but with the former, it must, and may only, be a reliance upon "consistency with sound policy and good morals as to the consideration or thing to be done."

The act of 1915, supra, which applies only to accidents happening after January 1, 1916, materially altered the substantive rules of law applicable to cases of personal injuries arising through negligence, since the statute largely abolished the defense of contributory negligence and entirely struck down the defenses of assumption of risk and negligence

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of a fellow employee (section 201, art. 2, P. L. 737); these material changes called for a new pronouncement of public policy applicable to the novel conditions thus created, and, no doubt, the recent legislative declaration is attributable thereto. Such being the inducing reasons for the pronouncement of 1915, the latter cannot upon any justifiable theory be made to affect cases arising under the old law.

In the Johnson and Ringle Cases, supra, we sustained the validity of contracts such as the one now before us, upon the express grounds, inter alia, that they insured benefits to injured employees, not only in instances where recovery could be had at law, but in a "wider field" where there was no liability, i. e., in cases of contributory negligence, assumption of risk, and negligence on the part of fellow employees. Under the law as it then stood, we felt, and said, that the working out of these contracts was not inconsistent with sound policy or good morals. Since then, however, taking into consideration the changes in the law made by the act of 1915, supra, the Legislature has, in effect, declared that it is inexpedient and against public policy to enforce these contracts, so far as they stipulate for a release from damages by the acceptance of benefits thereunder, and that all such releases "shall be void." But, as previously suggested, this declaration has no applicability to the present case, which arose under and was subject to the old law, before it was so radically changed by the act of 1915, supra.

On its facts, the case at bar is a hard one, and the writer cannot refrain from expressing regret that this court is forced to enter the order about to be made; but we must administer the law as we find it, and thereunder plaintiff had no legal right to recover the damages which the jury awarded him; on the contrary, binding instructions should have been given for defendant.

The second assignment of error, which complains of the refusal to enter judgment non abstante veredicto, is sustained; the judgment is reversed and here entered for defendant.

SUPREME COURT OF PENNSYLVANIA.

WOLFORD

v.

GEISEL MOVING & STORAGE CO.*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDINGS OF REFEREE—REVIEW.

The Supreme Court may review the ultimate or controlling findings of the referee of the Workmen's Compensation Board, when the material underlying facts indicate the character of the evidence upon which the ultimate or controlling findings rest.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE.

In a proceeding for compensation for death of plaintiff's husband, a piano mover, award of damages by referee and Workmen's Compensa-

*Decision rendered, Jan. 4, 1919. 105 Atl. Rep. 831.

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tion Board, approved by court of common pleas on ground that deceased died from an abscess brought about by violent exertion and strain and resulting pneumonia, *held* sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISTRIBUTION OF AWARD.

An award to a widow does not preclude an award also to the minor children of the deceased employee.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Court of Common Pleas, Cambria County.

Trespass by Annie May Wolford against the Geisel Moving & Storage Company for compensation under the Workmen's Compensation Act. The Workmen's Compensation Board affirms a referee's award of compensation, and from a judgment dismissing an appeal from the Board's order, defendant appeals. Affirmed.

Argued before Brown, C. J., and Stewart, Frazer, Walling, Simpson, and Fox, JJ.

George C. Bradshaw, John C. Sherriff, and Alexander P. Lindsay, all of Pittsburgh, and Evans & Evans, of Ebensburg, for appellant.

George E. Wolfe, of Johnstown, for appellee.

Fox, J. Dorsey Wolford was in the employ of the Geisel Moving & Storage Company, the appellant. His duty consisted largely in the moving of pianos. On May 4, 1917, he was engaged in moving a piano about 4:30 in the afternoon. He had the assistance of two other men. Upon his return home that evening he complained to his wife of severe pain in his back. On the next day, May 5th, he told Miss O'Conner, an employee of the Geisel Moving Company, that he thought he had injured himself in moving a piano the day before. He also made a similar complaint when he subsequently consulted a physician. He continued to work at his customary employment until noon of May 13th, when he was obliged to give up work. A physician was called and found that he was suffering with severe pain in the right side extending down through the abdomen to the leg. On May 16th, on the advice of his attending physician, he was sent to a hospital where he died on May 20th.

About a week after his death the body was exhumed and a post mortem held. This disclosed a narrowing in one place of the intestines; the lungs showed solidification, due to pneumonia. An abscess was found under the right kidney, containing pus, which upon examination showed streptococci and staphylococci bacteria; the lungs showed the same organism, but no pneumonia cocci were found.

The referee of the Workmen's Compensation Board, in addition to the facts already stated, found that the death of Wolford was caused by abscess, and pneumonia which resulted from abscess; that this abscess was brought about by the violent exertion and strain incident to the lifting of the piano on May 4, 1917. The referee having found these facts made an award to Mrs. Annie May Wolford, claimant, and against the Geisel Moving & Storage Company, defendant, of compensation for herself and children for a period of 300 weeks, as provided in article 3, section 307, clause 6, of the Workmen's Compensation Law (P. L. 1915, p. 736), and thereafter until the youngest child shall have reached the age of 16 years, as provided by clause 1 of the above article and section, to be computed on an average weekly wage of $20.

On appeal to the Workmen's Compensation Board that board sustained the findings of fact and law of the referee and dismissed the ap-

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peal. An appeal from this award was taken to the court of common pleas of Cambria county, and the court in an opinion filed dismissed the appeal. From that decision of the lower court this appeal was taken.

The appellant suggested three questions for our consideration:

(1) Was there sufficient legal evidence to sustain the finding of fact by the referee that the claimant's husband came to his death as a result of the accident suffered by him on May 4, 1917?

(2) If compensation is payable to the widow for 300 weeks, is each child under 16 entitled to compensation after 300 weeks until it became 16?

(3) If the children are entitled to compensation, do they take under clause 1 or clause 9 of section 307 of the Workmen's Compensation Act, and to whom is the award payable?

[1, 2] While it is true as urged that this court may review the ultimate or controlling findings of the referee of the board when the material underlying findings indicate the character of the evidence upon which the ultimate or controlling findings rest, we cannot find that either the referee, the Workmen's Compensation Board, or the learned judge of the court below committed any error in making the award of compensation. The learned counsel for the appellant argues that the fact that Dorsey Wolford met with an accident on May 4, 1917, and that the accident in question caused the abscess, is utterly unsupported by the testimony. The principal ground of complaint is that the declarations made by Dorsey Wolford on the day of the accident, shortly after it occurred, and the day after the accident, are hearsay evidence and cannot be considered. It is not necessary for us to decide in the case at bar that these declarations are admissible as part of the res gestæ. In a number of the other states the courts have held that where, as in the present case, the condition is a continuing one, such declarations are undesigned incidents of the particular litigated act and are admissible as illustrative of such act.

The test which has been applied in Pennsylvania heretofore with reference to declarations of this character is that they must practically be contemporaneous with the act itself. The fact that there is a casual connection between the act itself and the subject-matter of the declarations cannot be restored to as offering a basis for the admission of the declarations. In Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224, L. R. A. 1915D, 785, Ann. Cas. 1915C, 421, we held that incidents of this character more or less separated in time from the oringinal act could be received. In Van Eman v. Fidelity & Casualty Co., 201 Pa. 537, 51 Atl. 177, declarations of a similar character made to the wife of the decedent were admitted in evidence, and the propriety of this ruling was challenged in this court. We held that the judgment should not be reversed because of the admission of these declarations, inasmuch as another witness, who was competent, testified to the same facts. In the recent case of McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617, in discussing the question of proof in a workmen's compensation case, we held that in claims made under this statute liberality in the admission of proof and the inferences reasonably to be drawn therefrom were to be kept clearly in mind; but we also held that the referee and the Workmen's Compensation Board have no right to find material facts on hearsay testimony alone, but that the findings must rest upon such relevant and competent evidence of sound probative character as remains after excluding from consideration the hearsay testimony, whether such testimony be either circumstantial or direct.

Applying this test to the case at bar, is it possible to sustain the findings of the referee and compensation board, without resorting to a consideration of the decalarations above referred to?

Wolford was up to the 4th day of May, 1917, a man of good health and great strength. On that day he was engaged in the operation of

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moving a heavy piano. His suffering dated from that time until his death. He continued to work until May 11th, at noon, when he was obliged to give up because of his being incapacitated. His physician found that he was suffering with severe pain in his right side, extending down through the abdomen into the leg. After his death an autopsy was held, and it was found that he had an abscess under the right kidney, and that this abscess had produced the pneumonia which caused his death. His physician reported the cause of his death as perinephritic abscess, due to the injury received in moving a piano May 4, 1917—abscess followed by localized peritonitis. This report was made to the bureau of vital statistics of Pennsylvania. Dr. Emlen Jones, who was acting for the insurance company that carried the insurance for the appellant, testified, as stated in the opinion of the Workmen's Compensation Board, that the abscess was the result of an injury, and that the abscess could not have originated from any natural cause. This claim of circumstances, therefore, justified the inference that the accident produced the abscess, and that the abscess caused the pneumonia which resulted in the death of Wolford.

In our view, therefore, the findings of the referee and the Compensation Board were justified, and the learned judge of the court below committed no error in dismissing the appeal.

[3] The other questions raised by the assignments have been disposed of in the case of Catlin v. Pickett & Co., 262 Pa. 351, 105 Atl. 503. It is there held that an award to a widow does not preclude an award also to the minor children of the decedent.

The judgment is therefore affirmed.

COURT OF CIVIL APPEALS OF TEXAS

AUSTIN.

GEORGIA CASUALTY CO.

v.

GRIESENBECK ET UX. (No. 6042.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—SUIT TO CANCEL AND ANNUAL ORDER AND AWARD.

A suit by insurer under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44, to annul and cancel an award of the Inndustrial Accident Board made under article 5246-14, is not, strictly speaking, an appeal, and the trial is de novo; the effect being similar to that of an appeal from the justice court judgment.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACTION TO SET ASIDE AWARD—AMOUNT—JURISDICTION.

Where an insurer brings a suit to set aside the findings and award of the Industrial Accident Board under Vernon's Ann. Civ. St. Supp. 1918, art. 5246—44, the issue to be tried is, not the collection of the sum

*Decision rendered, March 12, 1919. 210 S. W. Rep. 273.

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of weekly payments due under the award, but the determination of the full amount of insurer's liability that might be recovered under article 5246—14 and, where such amount is in excess of $500, the district court has jurisdiction.

(For other cases, see Master and Servant, Dec. Dig. § 396.)

Appeal from District Court, Bastrop County; R. J. Alexander, Judge.

Proceeding by A. Griesenbeck and wife for an award for the death of their son, A. C. Griesenbeck, while an employee of the Bastrop Water, Light & Ice Company, before the Industrial Accident Board in which an award was made against the insurer Georgia Casualty Company, which filed an original petition in the district court to cancel and annul the order. From a judgment dismissing the suit for want of jurisdiction, plaintiff appeals. Reversed and remanded for new trial.

Orgain, Butler & Bolinger and Y. D. Carroll, all of Beaumount, for appellant.

Maynard & Maynard, of Bastrop, for appellees.

Nature and Result of the Suit.

JENKINS, J. We copy from appellant's brief, as follows:

"On August 25, 1917, the Georgia Casualty Company filed its first original petition, alleging that it was a corporation, organized under the laws of the state of Georgia, that it had a permit to do business in the state of Texas, that the defendants resided in Bastrop county, alleging, among other things, that on the 28th day of March, 1917, A. C. Griesenbeck, the son of the appellee here, was killed in the town of Bastrop, Tex.; that he was employed by the Bastrop Water, Light & Ice Company; that said company was a subscriber under the terms of the Employers' Liability Act of the State of Texas [Acts 33d Leg. c. 179 (Vernon's Sayles' Ann. Civ. St. 1914 arts. 5246h-5246zzzz)]; that the mother and father of the said A. C. Griesenbeck filed a claim with the Industrial Accident Board for compensatory insurance; that on the 27th of July, 1917, said board entered an order to the effect that the legal benficiaries of A. C. Griesenbeck, deceased, were entitled to receive of and from the Georgia Casualty Company compensation for the death of said A. C. Griesenbeck at the rate of $6.92 per week for a period of 360 weeks from the date of accident. The said Georgia Casualty Company, in its petition, prayed that said order be canceled and annulled.

"Thereafter defendant, on February 4, 1918, filed its original answer, and among other pleas, filed a plea to the jurisdiction of the district court, alleging that it appeared from plaintiff's petition that the amount of the controversy, exclusive of interest, amounted to less than five hundred dollars ($500.00); and the court, on a hearing of the plea to the jurisdiction, in all things sustained same and dismissed plaintiff's suit. The plaintiff then and there excepted, the same being entered February 5, 1918. Thereafter plaintiff's motion for a new trial, filed February 7, 1918, was overruled February 7, 1918. Plaintiff then and there excepted, giving notice in open court of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas. In due time plaintiff filed an appeal bond, February 28, 1918; and this cause is now duly and properly before this court."

Opinion.

There may be some question whether this case arose under the original Workmen's Compensation Act, or under the amended act. Appelles, in their brief, state that the same is immaterial and we will accept that view of the case.

As will be seen from the foregoing statement of the nature and result of this case but one question is here involved, and that is as to the

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jurisdiction of the district court to try this case. It is the contention of the appellees that the district court had no jurisdiction, for the reason that the weekly amounts allowed by the board did not at the time of the trial aggregate as much as $500. In support of their contention, they cite articles 5246—14, 5246—44, Revised Statutes of 1918; Roach v. Employers' Ass'n, 195 S. W. 328; Tex. Employers' Ass'n v. Bryan, 198 S. W. 342; Surety Co. v. Stubbs, 199 S W. 343; Jones v. Dodd, 192 S. W 1134; Ins. Co. v. English, 70 S. W. 440.

In the cases against Employers' Association above cited, it was held that the amount in controversy was the aggregate amount of the weekly payments due at the time of the trial, under the award made by the board. These cases involved the same principle decided in Jones v. Dodd and Insurance Co. v. English, supra.

In the case of Insurance Co. v. English, a policy had been issued payable in annual installments. Some of these installments were past due and unpaid when the suit was tried. The court properly held that the amount of the unpaid installments was the amount in controversy, for the reason that the suit was upon a contract, and the insurance company was not liable for any breach of the contract that had not occurred. There was no breach of the contract in failing to pay installments that were not due.

To the same effect is Jones v. Dodd, supra. The employers' liability cases above cited were correctly decided, for the reason that they were based upon that principle of law. The difference between these cases and the instant case is that in those cases no appeal had been taken from the award of the board. The liability had been fixed, and the insurance association had become liable therefor as the same accrued, which was by weekly payments. It was not liable to pay future allowances which had not yet accrued.

In the instant case there was an appeal from the award of the board. The statute with reference to objecting to the finding of the board is as follows:

"Any interested party, who is not willing and does not consent to abide by the final ruling and decision of said board, shall within twenty days after the rendition of said final ruling and decision by said board give notice to the adverse party and to the board that he will not abide by said final ruling and decision. And he shall within twenty days after giving such notice bring suit in some court of competent jurisdiction in the county where the injury occurred to set aside said final ruling and decision and said board shall proceed no further toward the adjustment of said claim, other than as hereinafter provided." Revised Statutes 1918, art. 5246—44.

Both the old and the new statute provide that when suit is brought the rights and liabilities of the parties thereto shall be determined by the provisions of the Employers' Liability Act, that is to say, if the beneficiary recovers in case of death, as in the instant case, he shall be entitled to judgment equal to 60 per cent. of the average weekly wages of the deceased, but not more than $15, nor less than $5 a week, for a period of 360 weeks from the date of the injuries.

[1] Bringing suit, as provided in article 5246—44, supra, though in the nature of an appeal from the action of the board, is not, strictly speaking, an appeal. The article last above cited further provides:

"If the final order of the board is against the association, then the association and not the employer shall bring suit to set aside said final ruling and decision of the board, if it so desires, and the court shall in either event determine the issues in such cause instead of the board upon trial de novo."

The effect of bringing the suit is similar to that of appealing from a judgment of a justice court. The trial is de novo; that is to say, it is

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to proceed as though no former trial had been had. If the statute had not provided for an investigation by the board, but only that suit might be brought by the insurance company to have it declared that it was not liable under the policy, the amount involved would have been the total amount of the policy, even though payments were to be made weekly. In other words, it would have involved the liability of the insurance association for the full amount of the policy. This statute clearly indicates that the association may bring suit in any court of competent jurisdiction to have its liability determined. The language of the statute is:

"Shall bring such suit in some court of competent jurisdiction in the county where the injury occurred, to set aside the final ruling and decision (of the board)."

[2] The filing of such suit, in effect, does set aside such decision and, the trial being de novo, the amount involved is the total amount to which the beneficiary would be entitled under the provisions of the act, if liability be shown, which in this case exceeds $2,000.

Appellees seek to apply the principle involved in the cases hereinabove cited, by reason of the following language in said article 5246—44:

"And the court shall in either event, determine the issues in such cause instead of the board upon trial de novo and the burden of proof shall be upon the party claiming compensation."

It is appellees' contention that, by the association filing suit, it thereby compels the beneficiary to become plaintiff in the cause. This may be granted, but the burden upon the beneficiary in such case is to establish liability on the part of the association, not for the weekly indemnity already accrued, but for the entire amount to be paid weekly. Should the beneficiary recover in such suit, the judgment should be for the entire amount found due under the policy to be paid weekly, for which he would be entitled to execution from time to time as such amounts become due.

If the contention of the appellees should be sustained it would amount to this: The board had adjudicated the claim, and had found that appellant was liable to appellees in a sum exceeding $2000, to be paid in weekly installments. If the appellant did not appeal from such decision, or bring suit to set it aside, its liability was fixed for the full amount, and thereafter it could not contest the same. In such case, if it failed to pay the weekly indemnities as the accrued, the beneficiary could not have execution on the amounts due, because the board has no power to issue execution. Such being the case, the remedy of the beneficiary would be to bring suit in some court of competent jurisdiction on the amounts that had accrued. Such was the case in the Roach and Bryan Cases, supra.

We think it is clear that where the association brings suit to set aside the finding of the board, as provided by the statute, the issue to be tried by the court is as to its liability for the full amount that might be recovered under the statute; and, as in the instant case that amount was over $2,000, the district court had jurisdiction to try the case.

For the reasons stated, the judgment of the district court is reversed, and this cause is remanded for a new trial.

Reversed and remanded.

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COURT OF CIVIL APPEALS OF TEXAS.

GALVESTON.

BATSON-MILHOLME CO.

v.

FAULK. (No. 7632.)*

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPLICABILITY.

In view of the Amendment of 1917 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91), *held* that where an employer, which became a subscriber under the Workmen's Compensation Act of 1913 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h—5246zzzz), failed to give the written notice to employees provided for by section 19, pt. 3, the statute was not binding on an injured employee who had no notice that the employer had adopted the act.

(For other cases, see Master and Srvant, Dec. Dig. § 358.)

2. MASTER AND SERVANT—INJURIES TO SERVANT—CARE.

A master cannot, as a matter of law, be said to be exercising ordinary care merely because he uses methods and appliances customarily employed by others in the same character of work, nor yet to be without such care solely because he fails to adopt the latest and most approved devices known, but the question in such cases is for the jury.

(For other cases, see Master and Servant, Dc. Dig. § 286[7, 8].)

4. MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE.

In an action by an employee of an oil company who was hurt by a falling pulley, evidence *held* to warrant a finding that the master was negligent in failing to examine the pulley, etc.

(For other cases, see Master and Servant, Dec. Dig. § 278[16].)

Appeal from District Court, Harris County; Henry J. Dannenbaum, Judge.

Action by C. E. Faulk against the Batson-Milholme Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry P. Lawther, of Dallas, for appellant
Woods, King & John, of Houston, for appellee.

GRAVES, J. The appellee, Faulk, an oil field worker, sued his employer, the appellant company, at common law for damages alleged to have resulted to him from its negligently permitting a sheave, or pulley, to fall upon him from the top of one of its derricks, at the bottom of which he was working.

Appellant respondent, first, with a plea in abatement of his suit because of his failure to make the Texas Employers' Insurance Association a party defendant, alleging that at the time of the injury it was a "subscriber," under the terms of the Texas Employers' Liability or Workmen's Compensation Act of 1913 (chapter 179, General Laws of the 33d Legislature [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h—5246zzzz]), had complied with all the requirements thereof, including provisions for payment of the compensation therein designated to its injured

* Decision rendered, Dec. 15, 1918. Dissenting Opinion, March 13, 1919. 209 S. W. Rep. 837.

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employees by taking out insurance for that purpose with the association named, and that it had given Faulk notice of such arrangements prior to his injury. Its further answers consisted of demurrers, denials—in particular of the acts of negligence charged—and a plea of assumed risk upon Faulk's part of a known danger.

The court submitted the cause to a jury upon special issues embodying inquiries as to whether or not appellant had been negligent as charged, whether Faulk had actual knowledge prior to receipt of his injuries that appellant had taken out the insurance it claimed to have done and as to what sum of money, if paid then, would adequately compensate appellee for any injuries he was shown to have received.

Among its answers, the jury having found that appellee did not, prior to receipt of his injuries, have actual knowledge that his company had provided for payment of compensation to its injured employees under the liability act, the court overruled the plea in abatement, and then entered judgment against the company in appellee's favor for $10,000 damages, found by the jury to have been sustained by him as a result of appellant's negligence. This appeal proceeds from that judgment.

[1] It is first very earnestly and ably contended that the court below erred in so overruling the plea in abatement, notwithstanding the jury's finding that no prior notice had been given Faulk that appellant had insured its employees as provided in this Liability or Compensation Act of 1913, because, it is insisted, under the proper construction of that act, no such notice was necessary or a prerequisite to so bringing Faulk's cause of action, if any he had, under its terms, as to leave him without the right to sue for damages at common law, as he did; in other words, it is said that the provision for such notice in section 19, part 3, of the act in question, is directory only, and a failure upon the employer's part to observe it does not in any way abridge his right to yet require the employee to resort alone to the compensation therein prescribed.

If this construction be correct—that is, if the liability act, with its fixed schedules of compensation, superseded his right to sue for damages at common law, despite the fact that he had not been given the prescribed notice—then Faulk had no case against appellant and the plea in abatement should have been sustained.

The question is not an open one in Texas, however, having already thrice explicitly determined adversely to appellant's contention, once each by the Courts of Civil Appeals of San Antonio, Amarillo, and Beaumont, in the order named. Kampmann v. Cross, 194 S. W. 437; Rice v. Garrett, 194 S. W. 670; Farmers' Petroleum Co. v. Shelton, 202 S. W. 194.

Appellant indulges no illusions about the effect of these holdings, concedes them to be directly counter to its view as to what our Legislature intended the effect of the required notice to be, and frankly asks this court not to follow them, but to construe the act as it does, and to reverse and render the judgment in its favor.

The practice in this court has been, when it has felt unwilling to previous decisions of other Courts of Civil Appeals in instance where conflicts between different ones of them did not already exist, to refrain from determining the matter in a contrary way, and thus creating a conflict, but to avoid that result by certifying the question to the Supreme Court. That course would not be followed if we were convinced that the courts mentioned were wrong in their several and like general conclusions that the unnotified employee was not cut off from his right to sue his employer, not remitted solely to the schedules of the compensation law; but, not so thinking, it becomes our duty to determine the issue here. Since however, our conclusion that the right result was reached in those cases rests upon somewhat different intermediary interpretations to some there announced as to the purpose and effect of the notice provision in the statute, this expression of them is ventured,

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under efforts to confine it mainly to considerations not presented by the other courts, and to avoid reargument of those they have advanced.

The provisions concerning notice referred to, that of the act of 1913, § 19, pt. 3, is this:

"Every subscriber shall, as soon as he secures a policy, give notice, in writing or print, to all persons under contract of hire with him, that he has provided for payment of compensation for injuries with the association."

What at that time was the object of, the purpose in, and the reason for this requirement?

As applied to a case of the character here developed, did the Legislature intend by this provision merely to require the employer to furnish his employee such concrete information as would enable the latter to obtain and reduce to possession the compensation which might thereafter become due him under a compulsory law, to which both of them, in consequence of the employer's having qualified as a subscriber thereto by paying the prescribed insurance premium, had already become unconditionally amenable, as appellant in effect contends, or did that body in the purpose to adopt, to a degree at least, an elective act, intend to impose upon the employer such a duty toward the employee as might, in the event of its non-performance, be so penalized against the former as to leave to the latter unimpaired his pre-existing right of action for damages, if he chose to exercise it? The power of the Legislature to have done either, under the opinion of our Supreme Court in the Middleton Case, 108 Tex. 96, 185 S. W. 556, now seems established, so that the inquiry is limited to which one of the two it did, or, more properly, to which it intended to do; accordingly it is thought that a very brief reference to the nature and history of the enactment will aid in furnishing an answer.

While the atmosphere about it is much clearer now after five years of operation under it, the fact must not be overlooked that the act before us, that of 1913, was the first try-out in Texas of this new system of compensation for injury without reference to negligence upon anybody's part; and it is not unthinkable that our Legislature, in the initial adoption of it to supersede the long-prevailing right of action for damages regarded as the legitimate penalty for negligence, was feeling its way somewhat slowly at first, and to a degree at least hesitating to bring about in all of its drastic details so radical a change in the rule of liability for personal injuries in industrial accidents as the compensation plan necessarily wrought; all the more is this supposable when it is recalled that both before and after the passage of this first legislative experiment with the new theory there was such widespread and persistent question made about its constitutionality as to bring it quite soon before the appellate courts for a settlement of that doubt. Middleton v. Tex. P. & L. Co., 178 S. W. 956, and 108 Tex. 96, 185 S. W. 556. Indeed, the chief ground of challenge of its constitutionally—and that upon the initiation of a member of the employee class—was its abrogation of a pre-existing and familiar rule of liability in its denial to those engaged in the service of a subscribing employer who had complied with all its requirements of a common-law action for damages. Middleton's employer had not only in other respects, but also in actually giving him the prescribd notice, complied fully with the terms of the law; yet he still contended that because the act was compulsory as to him, and took from him, nolens volens upon his part, his common-law remedy, at the option of his employer, it invaded his constitutional rights; and the Court of Civil Appeals sustained his contention (178 S. W. 956), which, however, the Supreme Court subsequently overruled (108 Tex. 96, 185 S. W. 556).

Are we, then, permitted to assume that the Legislature, when coming to act on a measure embodying a wholly new policy of such far-

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reaching and revolutionary effect upon pre-existing remedies, though mindful that wide-spread discussion and serious question was then agitating the people of the state as to its contitutionality in the very particulars that were later so presented to and passed upon by the courts in Middleton's Case, was entirely uninfluenced thereby? We think not, but rather that, responding to all these considerations, and uncertain then of the exact length to which it was permitted by our Constitution to go, especially in the matter of absolutely and unconditionally compelling all persons of both classes affected by it to submit themselves to its provisions, our Legislature was proceeding with caution and intending, as the Amarillo Court of Civil Appeals says in the Rice v. Garrett Case at page 671 of 194 S. W., "to adopt an elective act." In fact, we are not without some historical data strongly suggestive of this very purpose, furnished by the able and distinguished attorney for his appellant himself, the Hon. Harry P. Lawther, in a masterful address upon the constitutionality of the act here under review before the Texas Bar Association in 1915. After reviewing and discussing a number of the earlier elective or optional compensation acts of different American states, he there said:

"These so-called 'optional statutes' were the result of constitutional scruples and fears engenderd by the decision in Ives v. South Buffalo Ry. Co., supra (201 N. Y. 271, 94 N. E. 431, 34 L. R. A. [N. S.] 162, 23 A. & E. Ann. Cases, 156). As before stated they will be found upon investigation to be optional in name only; and are simply instances of legislative legerdmain, whose purpose, to use a homely phrase, was to 'whip the devil around the stump.' In my opinion, statutes of this character, in name as well as in fact, should be compulsory upon all affected by them, as are all other statutes."

See page 161, Proceedings Texas Bar Association, 34th Annual Session, 1915.

It may be that the learned advocate was right in saying that different Legislatures in giving homeopathic rather than heroic doses of the compensation cure to their patients, the people for whom they were legislating, were merely "whipping the devil around the stump," and should have made all such statutes compulsory in every respect; but does he not himself present convincing proof that they did not? Elsewhere in the same address (Bar Association Proceedings 1915, p. 149), referring to the opinion of the New York Court of Appeals, which in the Ives Case had held the compensation statute of that state unconstiutional, he says:

"This opinion of the New York Court of Appeals was accepted in that state, and the Constitution changed to meet the decision. The gist of it was that the plan proposed was violative of the constitutional provision guaranteeing to the citizen the equal protection of the laws, and prohibiting the taking of his property without due process of law; for the reason that, under the provisions of the act, the property of the employer was taken from him without fault on his part, and was also taken to pay the obligations of other employers."

Of course, what we are concerned with is not what should have been, but what was in fact intended to be done; and if the Legislatures of other states in the experimental stages of the adaptation of this European plan to American conditions, and to as many different constitutions as there were states trying it were at first unwilling to impose its extremes, why should the Legislature of Texas not be credited with a like hesitancy? Indeed, our act itself furnishes one direct instance of not applying all features of the scheme to the exclusion of every right under pre-existing law in its retention in section 5, pt. 1, notwithstanding that the employer may be a subscriber who has given the consequent notice that he is such, of the right in the surviving spouse and heirs of a deceased employee, whose death is caused by homicide through the willful act or omission of his employer, to recover exemplary damages in an action at

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law. If, therefore, the full effect of the system was not visited in one instance, nor a formerly obtaining right to sue for exemplary damages taken away, why should the conclusion seem unreasonable that the law-making body intended to stop short in another respect also, and to leave unimpaired his former rights through suit, if any he had, to such employee as had not been favored with the notice. And we think that is precisely what is intended by the notice provision quoted; that its plain purpose is to protect the employee who, but for the operation of the Compensation Act, would have a cause of action for damages at common law; that is, where his injuries have been proximately caused by his employer's negligence, and operates as a condition precedent to the employer's appropriation of the full benefits accruing to him under the act. Should he neglect or omit giving it, then he simply sleeps upon his rights, or fails to live up to his complete privileges, to the extent that he thereby needlessly leaves himself open to suits for damages on the part of such unnotified employee.

Nor is it any sufficient answer to this view of the effect to his failure to comply to say, as the employer here does, that he has, in the premiums paid for insurance proportionate to the total number of his employees, relieved himself from all such liability to any of them, no matter how situated, because, in the language of Chief Justice Phillips in the Middleton Case, 185 S. W. at page 559: "A Legislature may in proper instances prescribe duties and penalize their breach through an authorization for the recovery of consequent damages."

In other words, having the undoubted power to take away entirely the right of an injured employee to sue it at common law, as the opinion quoted from so ably demonstrates, the Legislature was clothed with equal authority to take it away upon such conditions as it saw fit to impose, and to require the employer not only to become a subscriber within the specified meaning of that term, but also to give the prescribed notice, before he could shut his employee, who otherwise possessed it, off from the right to hale him into court in a suit for damages.

The status of such an employee, upon the other hand, is so far fixed by the notice that after its receipt he is deprived of his otherwise existing right to sue for damages, and as a consequence can thereafter escape the resulting effect of the Compensation Act in that respect only by leaving the employment of a subscriber who has thus complied with all its requirements.

It seems to be generally conceded by members of the bar and of the courts that this legislation was enacted at the behest, and primarily for the benefit and relief of those engaged as employees in the various industrial pursuits throughout the state; indeed, the emergency clause appended thereto so recites. Upon that as an assumed fact, together with a likewise generally accepted statistical estimate that only about 18 per cent. of all injured employees become such as the result of their employer's negligence leaving, therefore, 82 per cent. who at common law would have no right of recovery, appellant builds what we consider an effective argument against the soundness of the San Antonio court's conclusion in the Kampmann Case, 194 S. W. 437, supra, that the giving of notice is a necessary condition precedent to bringing either employer or employee within the law at all. The idea presented is that the Legislature, in so avowedly passing a statute for the benefit of employees as a class, could neither be presumed to have lacked the knowledge everybody else concerned possessed, that the new system would leave without its pale 82 per cent. of all those it was especially designed to protect, nor with such knowledge to have intended to deny its advantages to such an overwhelming majority of the very ones the law was passed to accommodate. We cannot, therefore, agree with that court when it says: "The printed or written notice to the employee is the condition precedent to the benefits of the bill being appropriated by the employer," nor again when

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it declares in (8) of its opinion, at page 440 of 194 S. W.: "So far as the employee who has not been notified is concerned, the employer is not a subscriber. The notice creates the relation of subscriber employer and employee, and without the notice the relation cannot exist."

As before indicated, we do not think the giving of the notice by the employer a condition precedent to bringing the employee within the terms of the act at all; that is, to starting it in operation as between them, the employer having otherwise availed himself of its provisions; but that performance by him of the affirmative act of becoming a subscriber by payment of the specified premium, required of the employer by section 1, pt. 4, without any act on the part of the employee, puts the statute into effect, and covers the employee, except that the one who before had that right is not thereby deprived of his still subsisting privilege of suing for damages, unless and until the notice requirement also is met by his employer.

While thus agreeing to the extent stated with appellant's criticism of the quoted portions of the San Antonio court's opinion, it follows from the mere statement of our construction that no such result would ensue as appellant insists would flow from that court's conclusion, to wit, that 82 per cent. of all intended beneficiaries of the act— that is, those whose injury or death did not proceed from their employer's negligence— would be left unprotected, destitute, and a charge upon the state.

It may be freely conceded that the Ultima Thule of this legislation was the good or interest of the state, or, to again quote from the Bar Association address of appellant's counsel:

"The purpose of the act is a public one, with incidental benefits to the wageworkers as a class, in that it provides for compensation for all injuries received by them in the course of their employment, without regard to the fault of the person causing the injury; but the means of paying his compensation had to be provided. The act provides for its payment out of a fund which is created by contributions from employers in the way of premiums paid for policies of insurance. In order to afford immediate relief to the injured workingman or to his dependent beneficiaries in case of death, it is necessary that these contributions should be readily and speedily made. It is obvious that this result can be better obtained by voluntary action on the part of the employers rather than by involuntary obedience to a direct command. In order to render this action voluntary, it was necessary, notwithsanding the act took from the employer his property without fault on his part and to pay the obligation of other employers, to yet make it to his interest and advantage to accept its provisions. This was done by the enactment that if he refused to accept its provisions and stood on his rights at common law, he was deprived of all his common-law defenses. In other words, in the language of Mr. Justice Holmes, the act 'brought about, by the creation of motives less compulsory than command and disadvantages of holding aloof less peremptory than an immediate stop,' the same result that it might have compelled by direct command." Proceedings Texas Bar Association 1915, p. 158.

And it may further be that in a sense this compensation theory had its roots in the rich soil of the common law of Europe, and grew out of the gradual realization that 100 per cent. of all those injured in industrial accidents instead of much less than 20 per cent ought to be compensated; and that since ultimately the people—the consumer—paid for the injury anyway, the charge might as well, and much more justly to the employer and employee alike, be at once laid upon the industry itself as a kind of a necessary expense of operation, and in that form passed on to society, where alone it had finally to be liquidated, as was so ably argued before the Bar Association of Texas in 1917 by Hon. T. H. McGregor, formerly chairman of the Texas Industrial Accident Board (Texas Bar Association Proceedings 1917, vol. 86. p. 180). Still it is also true, according to

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the same authority, that the first crystallization of the plan into a statute was the act passed by the imperial government of Germany in 1884—a government under which is literal truth the interest of the state *was* (thank God for the privilege of now applying the past tense) paramount to such limits that from its birth the child was taught that it was the property of and belonged to the state; whereas in this democratic country it has always been taught that all free governments among men are instituted for the benefit of the governed, and to that broad sense the government belongs to it.

Conceding, then, the inherent and even paramount "interest of the state," as appellant puts it in quoting from the dissenting opinion of Mr. Justice Brandeis, of the United States Supreme Court, in New York C. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1049, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139, it yet may not be properly said that the Texas Legislature, while refusing to administer that interest according to such an ideal as the one referred to, failed to properly regard it in this enactment; for with us the public interest is the greatest good to the greatest number, and, as here interpreted, the purpose in this statute simply was, not only to bring the 82 per cent. then having no remedy within its protecting schedules, but likewise the 18 per cent. possessing such preexisting right, preserving to the latter the privilege of yet exercising it, in event they were left without notice of provision for them under the new law.

So that, in net result, the act takes care of 100 per cent. of those injured in industrial accidents, giving protection to the 82 per cent. who before had none, and at the same time, while putting its fixed compensation schedules instead of uncertain damages at the disposal of the 18 per cent. who were already provided for, does not compel absolute acceptance under any and all conditions, as appellant insists "the paramount interest of the state" makes inevitable, but in the contingency of their not being so notified, leaves unimpaired to this latter class their existing right of suit; thus in effect merely conferring upon them, in the circumstances stated, a choice of remedies, either to accept the compensation benefits, or, as before, to seek in the courts an award of damages. And if that be its object and effect, can such a statute, regarded from the standpoint of the public interest, be said to be unreasonable? Is it not rather a quite moderate exercise of the power to penalize the breach of a prescribed duty?

Now, in 1917, the act 1913 was so amended that, by express stipulation (section 3a, pt. 1, c. 103, Acts 35th Leislature 1917 [Vernon's Ann. Civ. St. Supp. 1918, art. 5246—4]), the employee, on entering upon service with an employer who was then a subcriber, would be held to have waived his right of action for damages under pre-existing law, if he did not upon his part give his employer simultaneous written notice that he claimed such right; or, if his contract of hire was made before the employer became a subscriber, then he had five days after notice to himself of such subscription within which, in turn, to give the notice of his claim.

Under the 1913 act the employee with notice had no further choice, and could not retain his common-law right by notice to his employer—that is, there was but one notice provided for, that emanating from the employer; while, under the amendment of 1917 also, this requirement must still be met, yet, after it has actually been, such notified employee may nevertheless continue holding his former right to sue by in writing advising his employer that he so intends.

Possibly this amendment may evidence a legislative construction that compliance with section 19, pt. 3, of the former act was not a condition precedent to making the law operative at all as to unnotified employees, but cannot, we think, be said to reflect the view that a properly situated one

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was not thereunder entitled to notice before being deprived of his then existing right of suit, for this reason:

The present law, while going a step further than was probably before thought permissible, in putting such an employee automatically and unconditionally under the act after his employer has become a subscriber, thereby modifying to that extent the effect of the notice still required of the latter, yet expressly takes cognizance of the former's common-law right, and in effect says that in all cases where employers are already subscribers it may be retained by the employee's giving notice for that purpose, and will be anyway for five days after notice to him of a belated subscription by an employer who had not made one when the contract of hire was entered into.

In other words, the Legislature of 1917, knowing, from our Supreme Court's deliverance in the Middelton Case, what the one of 1913 did not, that it could make the compensation statute compulsory upon all affected by it without destroying any fundamental right, as appellants' counsel says should have been done at first, did that very thing in this self-functioning section 3a of the amendment of that year, with the single proviso that the employee might himself avert that effect by giving the written notice required of him.

The amendment, therefore, seems to us a recognition that, under the unilateral provision of the first law, the employee having an outside cause of action was entitled to the prescribed notice before being shorn of it, and was intended to bring about what the Legislature considered a needed change in that respect—that is, to restrict the formerly unqualified elective features as to such an employee, and strongly to persuade, if not quite to compel, all of his class to come under the compensation plan. Especially does this appear probable in view of the further and concluding condition appended in the amendment, that, if still claimed at all, the outside cause of action will be subject to all the old common law and statutory defenses. See final paragraph section 3a, pt. 1, amendment to chapter 179, 35th Legislature 1917.

Neither, in our opinion, do the recitations of sections 4a and 6, pt. 2, of this 1913 act, relating respectively, to giving of notice of injury by employees to the association or the subscriber before proceeding for compensation thereunder, and to placing of employees of independent or subcontractors upon the same basis as to its benefits with those of subscribers, inveigh against the conclusion that there was a further and more substantial purpose in section 19, pt. 3, in so far as it affected employees having a prior right of suit for damages, than mere information that payment of compensation had been provided for with the association, because, by their explicit terms, these two sections in part 2 merely relate to liability for compensation, and only affect those prosecuting claims therefor, under the provisions of the act; hence in no way indicate that all employees, without reference to status, must accept that arrangement as their only recourse.

Appellant cites the recent case of Zancanelli v. Central Coal & Coke Co., 25 Wyo. 511. 173 Pac. 981, wherein the Supreme Court of Wyoming upholds the constitutionality of the Compensation Law of that state—no other question being involved—not as having any bearing upon the effect of the notice provision in our Texas act of 1913, but upon the general scheme and purpose of such legislation. It has been read with interest, but confirms our view that back at that time our Legislature must have suffered from the "constitutional scruples and fears" appellants' counsel says induced the various elective statutes of different states, before elaborated. The people of Wyoming after a state-wide agitation and discussion of it, had just adopted an amendment to their Constitution incorporating the full compensation system into their organic law, and speci-

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fically commanding the Legislature to pass such a law putting it into effect, as that—

"The right of each employee to compensation from such fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to such fund in favor of any person or persons by reason of any such injury or death."

The Legislature did so, expressly making the terms of the law "compulsory and obligatory upon both employers and employees coming within the provisions hereof."

Notwithstanding this direct authorization to enact it, and under facts showing that his employer had done exactly what the act required of him, Zancanelli ignorned it, and sued for damages anyway, attacking its constitutionality, with the result stated. It need not be repeated that our lawmaking body in the first try-out of the scheme here had no such blazed trail before it, nor any such direct injunction to then apply its most drastic feature.

It is apparent from the views expressed that we think no error was committed in overruling the plea in abatement, and the assignments assailing that action are overruled.

[2] Under the third, fourth, and sixth assignments it is said the court erred (1) in failing to tell the jury that appellant, in the exercise of ordinary care, did not have to use the latest and most approved crown block and method of fastening the sheave thereon; (2) in not asking them whether the crown block and method of fastening the sheave thereon actually used in this instance was such as was then customarily and ordinarily used by oil well drillers in the same kind of work, and whether appellant was negligent in so using it; (3) in permitting witness Pinkard to testify that there was a device which could have been used on the crown block here that would have prevented the accident. These assignments are overruled, under the conclusion that no material error is therein pointed out. On the questions here raised the rule in Texas, as we understand the authorities, is that the master cannot as a matter of law be said to be exercising ordinary care merely because he uses methods and appliances customarily employed by others in the same character of work, nor yet to be without such care solely because he fails to adopt the latest and most approved devices known; but the proof upon both these matters, along with other testimony upon the issue of negligence or the freedom from it, is admissible, and that it is still left to the jury to say, from all the evidence, whether or not, in the particular circumstances so shown, ordinary care was in fact exercised.

That rule was followed in this instance. The court first properly defined negligence and ordinary care, saying it was appellant's duty to use such care in both furnishing its employees reasonably safe appliances with which to work and in making periodic inspections thereof, and then asked the jury to find whether or not appellant had exercised that degree of care here (1) in furnishing appellant the sheave and axle upon which the same was fitted in the crown block with which to perform his work, (2) in the matter of inspecting the sheave and axle prior to the accident, and (3) whether proper inspection would have revealed any defect therein.

Upon these issues appellee's evidence showed there was in use by others in doing like work a device that would have prevented the spindle from slipping out of its groove, and thereby have averted the accident, which appellant had not used; while the latter's evidence showed these appliances in the manner used by it to be such as others in the same character of work customarily used—that is, the spindle was permitted to lie in an open groove in the crown block, unsecured except by the weight of the machinery itself.

Adverse answers to appellant having been returned upon each of

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the questions so submitted, judgment against it was properly rested thereon. Magnolia Paper Co. v. Duffey, 176 S. W. 90; Armour v. Morgan, 151 S. W. 861; Sincere v. Union Compress & Warehouse Co., 40 S. W. 326; Lyon v. Bedgood, 54 Tex. Civ. App. 19, 117 S. W. 898.

[3] Moreover, as to the testimony of Pinkard, essentially the same matters were elicited without objection from other witnesses. Mott v. Insurance Co., 154 S. W. 658; Insurance Co. v. Davis, 154 S. W. 1184; Railway v. Rogers, 156 S. W. 364.

[4] Through assignments 8, 9, and 10 it is claimed the jury's answers finding appellant guilty of negligence, in response to the three special issues set out in the preceding discussion of assignments 3, 4, and 6, the first two being answered in the negative and the third in the affirmative, were contrary to the uncontroverted evidence The argument is that proof that the sheave became loose in its axle, permitting the axle to work out of the open groove in the crown block, and the sheave to then fall down upon appellee—which result, it is claimed, disclosed an inherent and latent defect in the manufacture of the sheave and axle not discernible by inspection—did not support the finding that appellant failed to exercise ordinary care in the furnishing and inspecting of the sheave and axle, since the negligence thus shown went rather to the matter in which these two appliances were placed upon the crown block than to the furnishing of and keeping under proper inspection such ones as were in themselves reasonably safe.

The position is thought to be untenable. Not only, in our opinion, were both the allegations of negligence in the petition and the terms of the special issues so submitted broad enough to include the way the sheave and axle were attached to or placed on the crown block, but the undisputed proof—indeed, the admissions of appellant's own servant charged with the particular duty—showed no inspection to determine whether the sheave was loose upon the axle had been made for four days before the accident, and none of any sort since early morning of the next preceding day.

Of course, if the issue of ordinary care in the matter of how the sheave and axel were placed upon the crown block was in the case and the evidence was sufficient to justify a finding that negligence occurred in that regard—both of which suppositions we think may be affirmatively answered—then it becomes wholly immaterial whether the defect in the sheave itself was latent or not since the uncontroverted evidence already alluded to showed that no such available method of so fastening the axle in the crown block would have certainly prevented the accident was used.

Contention is made under the eleventh assignment that the jury's finding that Faulk had no notice, prior to his injury, of appellant's having become a subscriber under the Compensation Act, is against the overwhelming weight of the evidence. After closely examining the record, however, we cannot say that even the preponderance was against the finding. At most, there was a decided conflict upon the issue, the resolving of which is not the province of this court. The assignment is overruled.

[5] The judgment is last assailed as being excessive, and the result of passion and prejudice, because, it is said, the evidence demonstrated the injuries received to have been only temporary. But, after a careful examination of the statement of facts, we conclude otherwise, and think that although the testimony was conflicting in some respect, there was sufficient evidence to support these findings: That appellee, at the time of the accident a strong, healthy man, 31 years old, and earning $90 per month, was so injured as a result of it that, in addition to suffering greatly all the while, he was unable to work at all for a period of nine months, thereafter only becoming able to do light service, the performance of which caused him much inconvenience and continued pain; further,

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that he had also incurred such prmanent injury to his right shoulder and right arm as seriously impaired the future use of those members.

Under the facts, considering specially the earning capacity and the long expectancy, it cannot be properly said that an award of $10,000 would so shock the conscience of an appellate court as to justify it in setting aside a jury's finding. Freeman v. Grashel, 145 S. W. 695.

A feeling of regret affects both other members of the court that the aid and comfort of concurrence in all of this opinion on the part of the learned and experience Chief Justice may not be had.

Finding no reversible error, the judgment has been affirmed.

PLEASANTS, C. J. (dissenting). I am unable to agree with my Associates and the several Courts of Civil Appeals, whose opinions are cited in the opinion of the majority of the court in this case, in holding that the employee of a subscriber under the Texas Employers' Liablity Act of 1913 could maintain a common-law action for damages against his employer for personal injuries received in the course of his employment after the employer had become a subscriber under said act, but before the employee had received notice of the fact. It seems to me that, in order to give the act the construction placed upon it by the majority, the most fundamental rules for the construction of statutes must be violated, and the well-marked boundary line between the fair construction and judicial legislation obliterated. Having, after mature consideration, reached this conclusion, and believing that this disregard of the cardinal rules for construction of statutes opens the way for a dangerous encroachment by the courts upon the lawmaking power which our Constitution exclusively confers upon the legislative branch of our government, I feel constrained to respectfully dissent from the opinion of the majority, notwithstanding the fact that since the recent amendment of the statute in 1917 this exact question will not likely again arise.

Section 3, pt. 1, of the act (article 5246i Vernon's Sayles' St.), provides:

"The employees of a subscriber shall have no right of action against their employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employers for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the Texas Employees' Insurance Association as the same is hereinafter provided for."

The exemption of an employer, who, in compliance with the provisions of the statute, has provided insurance for the compensation of his employees for injuries received in the course of their employment, from suit for damages for personal injuries by an employee is given unconditionally in plain and explicit language. But the majority of the court, invoking the sound and well-settled rule that in construing any part of a legislative act the whole act should be considered, and its several parts so interpreted and harmonized as to to give effect to the intention of the Legislature as disclosed by the entire act, say that this provision of the act does not mean what it says, because section 19, pt. 3, of the act (article 5246x, Vernon's Sayles' St.), provides:

"Every subscriber shall, as soon as he secures a policy, give notice, in writing or print to all persons under contract of hire with him that he has provided for payment of compensation for injuries with association;" and because there having been great doubt in the public mind at the time this act was passed as to whether an act which deprived an employee nolens volens of the common-law cause of action against his employer for damages for personal injuries would be constitutional, it will be assumed that the Legislature entertained this doubt, and in recognition thereof intended that the act denying the employee the right to sue his employer for damages for personal injuries should not be operative as to an em-

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ployee who had not, before his injury occurred, been given notice as directed in the provision of the act last quoted.

It seems to me that this construction of the act is wholly unwarranted. The provision for notice to the employee is merely directory, and cannot, under well-settled rules of decision, be given the effect of a mandatory statute. State v. Connor, 85 Tex. 143; Kulp v. Railey, 90 Tex. 310; Altget v. Callaghan, 144 S. W. 1166. It occurs in an entirely different part of the act from the provision denying an employee the right to sue a subscriber employer, and there is nothing in the context to indicate that the two provisions are related to, or dependent upon, each other. It is not necessary, in order to give effect to this requirement of notice, to regard it as a limitation upon the provision exempting the subscriber from suits for damages. I think the reasonable construction of the act is that the only purpose of the Legislature in requiring this notice was to enable the employee to comply with section 4a, pt. 2, of the act (article 5246ppp, Vernon's Sayles' St.), which provides:

"No proceeding for compensation for an injury under this act, shall be maintained unless a notice of the injury shall have been given to the association or subscriber, as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or in the case of the death of the employee, or in the event of physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity."

If an employee of a subscriber under this act was kept in ignorance of the fact that his employer had become a subscriber, such employee would not know that he was required, in order to obtain compensation for injuries received by him in the course of his employment, to comply with the provision of the section of the act last quoted; and, in order to obviate the delay and complications that might be thus caused the employee in collecting the compensation due him, it is an appropriate and reasonable requirement that the employer when he becomes a subscriber shall give notice of that fact to his employees.

It being entirely consistent with the general purpose and intent of the act as a whole to accord to this requirement as to notice to the employees the purpose and effect stated, it should be given this construction rather than one which is entirely out of harmony with the general purpose and intent of the statute. As plainly indicated in the body of the act and in the emergency clause, the purpose of the statute was to change the existing law in regard to liability of employers for personal injuries to their employees, or for death resulting from such injuries, so that employees sustaining injury in "industrial accidents" might have adequate protection. In order to provide such protection to employees of persons engaged in industrial pursuits, the employers are required to provide compensation insurance for all of their employees under penalty of being deprived of their common-law defenses against claims for damages for injuries received by the employees in the performance of the duties of their employment if they failed to provide such insurance. It greatly lessens the beneficial operation of the act to give it the construction placed upon it by the cases of Kampmann v. Cross, 194 S. W. 437, Rice v. Garrett, 194 S. W. 670, and Farmers' Petroleum Co. v. Shelton, 202 S. W. 194, which hold that the act does not become operative as to an employee who has not been given the notice required by article 5246x, above quoted. This interpretation of the requirement as to notice is not only directly contradictory of the express and unequivocal provisions of article 5246i, but is so out of harmony with the general purpose and intent of the act, and would cause it to operate so unfairly and unequally upon those for whose benefit it was passed, that my Associates decline to adopt such construction. It seems to me that the construction given the act by the majority opinion in this case is hardly less obnoxious to rule of equality

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and uniformity than that given in the opinions cited. There is nothing in the language of the act which suggests, nor is there any reason for supposing, that the Legislature intended by this act to say that an employee who had received notice that his employer had obtained accident insurance for his benefit could look only to the insurance company for compensation for any personal injury he might receive, but an employee of the same employer, doing exactly the same kind of work, who had not received such notice, could hold the insurance company or his employer liable as he might elect, or as the circumstances under which he was injured showed the injury was due to his own or his employer's negligence.

The only reason offered by the majority opinion for attributing this intention to the Legislature is the supposed general doubt in the minds of the Legislature of its constitutional right to abrogate the rule of the common law which gives to an employee a right of action against his employer for damages resulting from personal injuries. We have no means of knowing how prevalent this doubt may have been, nor to what extent it may have affected the minds of the Legislature. We do know, however, that there was very little foundation for such doubt, because it had been held by courts of the highest authority, both before and since the passage of this act, that no one has a vested interest in the rules of common law themselves. If a property right has vested under a common-law rule, such right cannot be destroyed by a change in the rule, but it is entirely competent for the Legislature to change or repeal such rules. Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 556.

One cannot read the majority opinion in this case, nor the opinions cited to support it, without reaching the conclusion that the controlling idea in the mind of the court was that the common-law right of action could or should not be taken away from the employee without his consent; and therefore unless the notice required by the statute was given, and the employee after receiving such notice remained in the service, he should not lose his common-law right of action. With this idea uppermost in their minds, they attribute an intention to the Legislature, in enacting the provision as to notice, which is not only not evidenced by anything in the language of the act, but contrary to its express provisions and its general purpose and intent. In other words, they unconsciously give the act a meaning in conformity with what they think the law ought to be, in disregard of what the Legislature said it should be. In order to give the act this construction, the majority opinion goes outside of the act, and bases its holding upon the assumption that the Legislature doubted its power or right to take from an employee without his consent, the common-law right of action for damages resulting from personal injuries, and therefore intended that the act should not have this effect as to an employee who had not been given the required notice. This is not a permissible method of construing a legislative act. If the meaning and intention of the Legislature can be ascertained from the act itself, and all of its provisions harmonized and given effect, it is not permissible to resort to other means of interpretation. Even if the court is satisfied that the Legislature meant something not expressed in the act, it cannot depart from the plain meaning of the language, and give effect to such unexpressed intent. To follow any other rule of construction would be the usurpation by the courts of the legislative function.

The rule of construction which I think should be followed in interpreting this statute is thus already stated in the case of Alexander v. Worthington, 5 Md. 485:

"The language of a statute is its most natural expositor; and, where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations. The construction is to be on the entire statute, and where one part is suceptible indifferently of two constructions, and the language of another part is clear and definite, and is consistent with one of the two constructions of which the former part

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of the statute is susceptible, and is opposed to the other construction, then we are to adopt that construction which will render all clauses of the statute harmonious, rather than that other construction which will make one part contradictory to another. Where the letter of the statute is inconsistent with itself, we may eviscerate an intent by considering the mischief existing and the remedy proposed to be introduced. * * * We are not at liberty to imagine an intent, and bind the letter of the act to that intent; much less can we indulge in the license of striking out and inserting, and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence. Every construction therefore, is vicious which requires great changes in the letter of the statute, and of the several constructions that is to be preferred which introduces the most general and uniform remedy."

It is never permissible to give a provision of a statute a different meaning from that plainly expressed by its language unless such meaning is contradicted by other plainly expressed provisions, or is requgnant to the general purpose and intent of the statute considered as a whole.

We cannot create a conflict in the provisions of a statute by giving any of its provisions a meaning not required by its plain and unambiguous language. Southerland on Statutory Construction, pars. 237 to 241, inclusive, and cases there cited.

It follows from the views above expressed that I am of opinion that the judgment of the court below should be reversed, and judgment here rendered for appellant.

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The act providing for election between compensation for death under act or damages in law action, and under section for waiver of right to bring law action by application for compensation is not violative of Const. art. 16, as abrogating right of adult to recover damages for death, an adult being capable of making election—the act in so far as it attempts to limit compensation to minor heirs and enforce a waiver of right to bring law action for death, is invalid where death was by employee's wrongful act, minors having right of action in such case. Garfield Smelting Co. v. Industrial Commission of Utah (Utah) 531
In defining terms "employer" and "employee" in any statute passed in pursuance of Const. Art. 20 authorizing Compensation Law, no definition therein contained can enlarge scope of constitutional authority. Employers' Liability Assur. Corporation, Limited, of London, England, v. Industrial Accident Commission. (Cal.) 407
Compensation Law if authorizing state Industrial Commission to require mutual insurers and self-insurers, whose solvency was not doubted to pay into state fund the present value of future installments of compensation under awards for death claims is unconstitutional as discriminating against such insurers and in favor of others, etc. Sperduto v. New York City Interborough Ry. Co. (N. Y.) 503
Legislature had power to provide that one negligently killing employee subject to act should be liable to dependents instead of next of kin. Travelers' Ins. Co. v. Padula Co., Inc. (N. Y.) 339

§ 848. CONSTRUCTION AND OPERATION OF STATUTES IN GENERAL.

Compensation Act being highly remedial and beneficent in purpose is to be liberally construed. Karoly v. Industrial Commission of Colorado et al. (Col.) 93
Compensation Act provides compensation and new remedies for those injured in industrial employments which involve loss, delay and expense and render more certain recovery of compensation when most needed and is to be interpreted with liberality calculated to effectuate such purpose—Pub. Laws 1916, c. 1378, was enacted after passage of Compensation Act and is therefore, in so far as their provisions conflict, if such be the case, controlling. Taglinette v. Sidney Worsted Co. (R. I.) 662
Compensation Act having been primarily intended for protection and benefit of employees it should not be given such strict and technical construction as to deprive meritorious claimant of compensation. Bates & Rogers Const. Co. et al. v. Allen (Ky.) 719
Supreme Court must assume that words of Statute amending and reenacting Compensation Act were chosen with reference to their established legal

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meaning. Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al. (Wis.) 671
Provisions of act should be liberally construed. Holt Lumber Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.)..... 549
Provisions of Compensation Act which benefit both master and servant should be liberally construed without regard to technical rules. Rish v. Iowa Portland Cement Co. (Iowa)..... 463

§ 349. RETROACTIVE OPERATION OF STATUTES.

Amendment as to appeals from order of Industrial Commissioner taken after July 1 applies to injuries received before as well as those received after July 1, when statute became effective. Rish v. Iowa Portland Cement Co. (Ia.) 463
Section relating to reduction of compensation 15 per cent in case of willful failure to obey safety rule has no application to accident occurring before statute was in force. Frint Motorcar Co. v. Industrial Commission of Wisconsin et al. (Wis.)..... 399

§ 351. —— RIGHT TO ELECT, AND EFFECT OF ELECTION IN GENERAL.

Under Compensation Act it is elective both with employee and employer whether they shall become subject to its terms—employer who chooses to become subscriber is liable to employees of his subcontractor, situated with reference to work on employer's premises and subject to peculiar conditions thereof, having elected to become so liable. Duart v. Simmons (Mass.) 136
In view of section of act as to employer electing to come under act being relieved of other liability and other sections which state conclusive presumption that mine operator is within act unless he elects otherwise, where injured miner sued, and, when demurrer was sustained to declaration, amended, after cause was barred, by adding allegation that employer had elected not to come within act, he could not recover; the original declaration being not merely defective, for the allegation that employer is not covered by act is essential to the statement of the cause of action at common law. Davis v. St. Paul Coal Co. (Ill.)..... 244
Servant, having accepted compensation under Act can have no standing in court to assert employer's further liability to him for exemplary damages on ground of gross and reckless negligence—Act does not require employer to take affirmative in matter of fixing standards of safety, nor does failure to do so work a forfeiture of protection of the Act. Stricklen v. Pearson Const. Co. (Ia.) 291
Supreme Court must assume that Legislature adopted with full understanding of its legal effect, language of Statute providing that certain sections, shall not apply to employees switching freight cars for railroad company, unless both employer and employee have accepted provisions of act. Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al. (Wis.).... 671
Defendant railway engaged chiefly in switching cars of other companies, held, to have been at time plaintiff was injured while engaged in switching box cars operating a steam railroad as common carrier," within Compensation Act, denying compensation in such case unless both employer and employee shall have accepted provisions of act in writing. Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al. (Wis.)..... 671
Administrator of deceased's servant's estate cannot maintain action against master for servant's wrongful death where such servant had accepted Compensation Act. Penn's Adm'r. v. Bates & Rogers Const. Co. (Ky.) 731
Employer, not included in any classes enumerated in Compensation Act may, by operating under act, free himself from common-law statutory liability for injuries arising out of employment. Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission et al. (Ill.)..... 617
That employer had posted notices of election not to operate under act, though such posting was insufficient, held not to estop employer from denying that it had effectually rejected act. Reynolds v. Chicago City Ry. Co. (Ill.) 608
Remedy under act is exclusive, no cause of action arising at common law or under Employer's Liability Act, except where employer has failed to secure payment of compensation. Nulle et al. v. Hardman, Peck & Co. (N. Y.) 343
Where injured employee under act brought action against married woman and suit was dismissed claimant, by election to sue her, is barred from, subsequently seeking award under act against husband and wife jointly, evidence showing that wife was in fact employer. Crinieri v. Gross et ux. (N. Y.) 349
Though stevedore presented claim and accepted compensation under State Compensation Law held that as Commission was without jurisdiction the acceptance of compensation is not bar to libel in admiralty, the payments if made by employer being deductible from recovery and if made by state to be treated as gratuities. Neumann v. Morse Dry Dock & Repair Co., Inc. (U. S.)..... 562

§ 352. —— WILLFUL OR INTENTIONAL ACTS OR OMISSIONS OF EMPLOYER.

Act is not bar to common law action for damages by infant, employed in violation of Penal Law. Wolff v. Fulton Bag & Cotton Mills (N. Y.).... 354

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§ 354. —— RIGHT OF ACTION AGAINST THIRD PERSON.

Section 5 of Compensation Act gives injured employee statutory action or proceeding against employer for compensation and also for damages against wrongdoing third party causing his injuries, and where such person is not estopped by her acceptance of compensation already provided for her, nor by her participation in arbitration proceedings to determine her compensation, nor by other actions constituting ratification or acquiescence, she may prosecute her action against both employer and wrongdoing third party, and she is not required to choose between compensation allowed and damages which she may recover, until action is tried and determined, but she is not entitled to recover both damages and compensation—the word "recover" means to "get," "procure," "obtain," and the like and provision concerns itself with actual payment and is not limited to recovery of judgments upon which nothing may be realized. Swader v. Kansas Flourmills Co. et al. (Kan.)..... 125

Where employee who as well as employer has elected to come under act is injured by third person, who is not under act, employee need not elect between compensation under act and damages at common law, but may prosecute both actions at same time. Gones v. Fisher (Ill.)..... 596

§ 356. —— COMMON-LAW DEFENSES ABOLISHED.

Immaterial whether risk was assumed by acts of employee or by his contract of employment. Bay State St. Ry. Co. v. Rust (U. S.)..... 8

Employer who has elected not to accept Compensation Act has waived its right to interpose common-law defense of assumed risk. New Staunton Coal Co. v. Fromm (Ill.)..... 432

§ 357. —— PERSONS ENTITLED TO ELECT.

Plaintiff may have been under Compensation Act by reason of his employer's election, is insufficient to place him under act as amended, his employment having been intermittent and there having been, no election by him under Statute requiring election by both employee and employer. Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al. (Wis.).... 671

Heir who is not sui juris cannot waive right of action by application for award, or vice versa under Industrial Commission Act, being incapable in law of making election—mother by applying for compensation for father's death does not waive minor children's right to brng acton for damages. Garfield Smeltng Co. v. Industrial Comission of Utah (Utah)..... 531

§ 358. —— FORM AND REQUISITES OF ELECTION (INCLUDING IMPLIED ELECTION).

Subcontractor's employee by failing to give notice to chief employer, on whose vessel he was to work, that he claimed his right of action at common law for any injuries decided to become bound by act, and to waive common-law right. Duart v. Simmons (Mass.)..... 136

Stevedore injured while loading vessel who was entitled to remedy afforded by State Act, held not to have elected that remedy by signing at request of attorney the notice to employer contemplated by Compensation Act and to be entitled to sue in admiralty. Siebert v. Patapsco Ship Ceiling & Stevedore Co. et al. (U. S.)..... 219

Where employer which became subscriber failed to give written notice to employees provided for by Statute, it was not binding on injured employee who had no notice that employer had adopted the act. Batson-Milholme Co. v. Faulk (Tex.)..... 805

§ 359. —— TIME OF ELECTION.

Compensation Act permits election only by filing and posting notices not to be bound 60 days before expiration of calendar year a failure to post such notices within that time is election to comply with provisions of act for ensuing calendar year. Reynolds v. Chicago, City Ry. Co. (Ill.).... 608

§ 361. —— IN GENERAL.

Digging trenches with shovel in plumber's business of making private connections with city sewers is "excavating" under statute naming such work as extrahazardous—it being more dangerous than ordinary occupation though there be more hazardous excavations. Scully v. Industrial Commission of Illinois (Ill.)..... 30

"Employee" as used in act as "every person in service of another under contract of hire" is to be broadly construed. Marshall Field & Co. v. Industrial Commission of Illinois et al. (Ill.)..... 105

Superintendent of wholesale dairy route, who left employer's place of business to instruct new driver, traveling by street railway, and who, upon alighting from car was killed by automobile, was not at such time engaged in "hazardous" occupation, within act or in service of employer whose principal business was hazardous. Balk v. Queen Dairy Co. et al. (N. Y.)..... 177

Under act coal yards were not classified among "hazardous employments"—laborer, injured by coal falling on him while unloading coal in railroad car within yard of employer, was not "operating a wagon" within act as to "hazardous employment." In re Hassen—Appeal of United States Casualty Co. (N. Y.)..... 181

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Laying carpets is not "upholstering" within any of the definitions given the word by standard lexicographers and especially not within act. Stradar v. Stern Bros. et al. (N. Y.) 191
One who was engaged in no other business than managing, maintaining and keeping in repair some 12 or 15 buildings, all, except 1 or 2 owned by his children, belonging to him, keeping a foreman for the purpose, was engaged in the "business of maintaining buildings" within the act. Storrs v. Industrial Commission et al. (Ill.) 238
Child Labor Law, the Women's Ten Hour Law, the Health, Safety, and Comfort Act and a city ordinance requiring persons conducting meat markets to take out licenses, and imposing penalties for false weights, do not bring employer conducting store and butcher shop within Compensation Act by reason of section 3, cl. 8, applying the act to persons engaged in enterprises in which statutory or municipal ordinance regulations are imposed for protection of employees. Deitrich v. Industrial Board et al (Ill.) 248
Administrator or executor, if employer of labor, may become subscriber instead of remaining under common law subject to disadvantages imposed by Statute. Keohane's Case In re McCarthy. In re Massachusetts Bonding & Ins. Co. (Mass.) 742
Where one carrier employed watchman at crossing and another company operating a parallel track paid one-half of salary, relation of employer and employee within meaning of act existed between each railroad and watchman. San Francisco-Oakland Terminal Rys. v. Industrial Accident. Commission (Cal.) 682
Receivers of railroad company are presumed to be operating under Compensation Act until they elect not to come within its provisions, though before their appointment corporation had made such election—receivers are "employers." Unrine v. Salina Northern R. Co. et al. (Kans.) 623
Where partnership acted as agent in making contract of hiring with claimant for compensation and failed to disclose the principal and claimant was led to contract under belief it was with firm as principals, claimant, on learning facts, could not treat his contract as binding on either the firm, or their principals, at his election and having elected to hold firm they must answer to him. Scott v. O. A. Hankinson & Co. et al. (Mich.) 759
Night engineer, of piano factory was an "employee in hazardous employment." Nulle et al. v. Hardman, Peck & Co. (N. Y.) 343
Act does not extend to employee on vessel in navigable waters and Industrial Commission cannot collect from employer premiums on account of such employees—employees of corporation engaged in dredging upon navigable waters, employed solely on land, fall within act—where employees engaged partly on land and partly on dredges subject to admiralty jurisdiction, Industrial Commission was entitled to collect premiums to be paid in proportion to time employees spent on land and on navigable water. Puget Sound Bridge & Dredging Co. v. Industrial Ins. Commission et al. (Wash.) 544
Switchman injured while engaged in intrastate commerce; his only remedy is under state act. Ward v. Erie R. Co. (N. Y.) 363
When Compensation Act which applied to employees of railroad company was amended so as to exclude employees of all railroad companies operating steam railroads as common carriers, intent was to exclude companies organized as railroad companies and doing business as common carriers. Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al. (Wis.) 671
In determining whether relationship of employer and employee existed general law as well as Compensation Statute itself must be considered—definitions of same under Compensation Law are broad enough to include both general and special employer. Employers' Liability Assur. Corporation, Limited, of London, England, v. Industrial Accident Commission (Cal.) 407
Where partnership furnished men and foreman to cement company who were to be paid by partnership with funds furnished by cement company, partnership retaining power to hire and discharge, men were under joint control of partnership and company, who were jointly associated in carrying out the work. Employers' Liability Assur. Corporation, Limited, of London, England, v. Industrial Accident Commission (Cal.) 401
Illegal contract of employment does not destroy operation of act. Frint Motorcar Co. v. Industrial Commission of Wisconsin et al. (Wis.) 399
Cause of action by taxicab driver for injuries received as result of defective wrench furnished by employer does not fall within Employers' Liability Act. Ridley v. Portland Taxicab Co. (Ore.) 520
Machinist regularly employed by master in repairing motorcars injured while present to repair its cars which were racing, was within regular employment. Frint Motorcar Co. v. Industrial Commission of Wisconsin et al. (Wis.) 399

§ 362. —— CASUAL EMPLOYMENT.

"Casual" as applied to employment in act has reference to contract for service and not to particular item of work being done at time of injury. Scully v. Industrial Commission of Illinois (Ill.) 80
Character of contract of employment as to whether it was casual or not was fixed by contract of hiring—structual ironworker sent from union headquarters, with three other members to complete job requiring only three or four days' work and who was employed by railroad for particular job only, was engaged in "casual employment." Chicago Great Western R. Co. v. Industrial Commission of Illinois et al. (Ill.) 14

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Construction of buildings referred to, held within "usual course of employer's business" within meaning of act. State ex rel. Lundgren v. District Court of Washington County (Minn.) 159
Under Act providing that term "employee" shall not include any person whose employment is but casual, a carpenter temporarily employed as helper on transfer wagon, held not an employee within act. Thede Bros. et al. v. Industrial Commission et al. (Ill.) 242

§ 863. —— FARM LABORERS.

Under Compensation Act if worker upon farm may be reasonably classified as one engaged in agriculture, his employer is not liable—workman whose sole duty is to repair wagons in shop operated on farm is "engaged in farm labor." Miller & Lux Incorporated v. Industrial Accident Commission of California (Cal.) 567
Injury to farm hand, assisting in unloading ice from sleigh to farm icehouse, was not within act where ice was used for farm purposes and not for pecuniary gain, injured employee being farm laborer. Mullen v. Little (N. Y.) 509

§ 864. —— PUBLIC EMPLOYEES.

Borough policeman is an "employee" of borough within the act. McCarl et al. v. Borough of Houston (Pa.) 789
In proceeding by street sweeper for compensation for injuries received when run down by automobile, city traffic ordinances are not "ordinances" within Cmpensation Act and liability cannot be predicated on ground that employment was one in which municipal ordinances were imposed for protection of employees and public cities and incorporated villages are "employers"—city street paved with asphalt is a "structure" within the act and sweeping and cleaning of such street is "repairing or maintaining." City of Rock Island v. Industrial Commission of Illinois et al. (Ill.) 592

§ 865. —— EMPLOYEES ENGAGED IN INTERSTATE COMMERCE.

Terms of Compensation Act are broad enough to include employee working in connection with discharge of cargo of vessel engaged in interstate or foreign commerce, only master and seamen of vessels so engaged being excluded. Duart v. Simmons (Mass.) 136
Under act as amended exempting railroads which do an interstate business, employee of such railroad, though bulk of its business is intrastate, is not entitled to compensation, but can recover only in accordance with latter part of the amendment which enacts within state the provisions of the federal act. Spokane & I. E. Ry. Co. et al. v. Wilson et al., Industrial Insurance Commission (Wash.) 301
With respect to employer engaged in interstate commerce, section 53 of act applies provisions of act unconditionally to those of his employees whose work is wholly intrastate and clearly separable and distinguishable from work of interstate commerce, though same section, with respect to employees who are engaged partly in intrastate and interstate commerce, provides that act shall apply only upon condition that employer and such employees voluntarily accept provisions of act by formal writing approved by commissioner. Suttle v. Hope Natural Gas Co. (W. Va.) 205
Evidence showed that bolt upon which plaintiff was working when injured, was put on particular engine, engaged in interstate commerce. Atlantic Coast Line R. Co. v. Woods (U. S.) 6
Servant engaged in wheeling bricks from freight car on siding to freight terminal in course of construction was not engaged in interstate commerce and could not recover under federal Employers' Liability Act, when injured through the negligence of fellow servant. Matti v. Chicago, M. & St. P. Ry. Co. (Mont.) 163
Member of repair gang killed while passing from one car to other, was engaged in "interstate commerce." Southern Pac. Co. v. Industrial Accident Commission (Cal.) 13
State Employers' Liability Act as amended by section 30 or original Act excludes its application to any employer acting as a common carrier in interstate commerce by railroad, does not apply where deceased servant's employer was so engaged, regardless of whether servant's work was a part of railroad's interstate commerce. Bergeron v. Texas & P. Ry Co. (La.) 308
Where interstate and intrastate carriers had parallel tracks and each paid half of salary of watchman, and watchman was killed by train of interstate carrier at time when train also came by for intrastate carrier, jurisdiction of state Industrial Commission was not lost as to intrastate carrier by reason of federal act. San Francisco-Oakland Terminal Rys. v. Industrial Accident Commission (Cal.) 633

§ 868. —— MINORS.

Action by administrator of boy under 14 employed in violation of Labor Law and killed while engaged in employment enumerated in Compensation Act, Art. 1., Sec. 2., Group 23, brought for benefit of father and next of kin cannot be maintained, Sec. 11 of later act providing exclusive compensation. Robilotto v. Bartholdi Realty Co. (N. Y.) 59
Department store company, by its void contract employing girl under 14 years of age, could not limit its liability for injury to her to compensation fixed

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by Compensation Act, to which she was unable to give assent—misstatement by girl of age in order to secure employment is no defense to employer, sued for injury to her, and claiming only remedy is under Workmen's Compensation Act, despite illegality of employment; prohibition against employment of child under 14 being absolute. Sechlich v. Harris-Emery Co. (Iowa)..... 186

Held that the charge adopted was proper test of vice-principalship and a new trial should not have been granted because of alleged error in charge. Gutmann v. Anderson (Minn.)..... 765

Unless employer has age and employment certificate provided for by Statute, minor between ages of 14 and 16 is not working at an age legally permitted under laws of state—where employer who has received from proper school committee and has in his possession a certificate in form substantially as required by law, he is not required to investigate accuracy, but is entitled to rely upon it as rendering employment of child named as being legally permitted and said child is sui juris as an employee. Taglinette v. Sydney Worsted Co. (R. I.)..... 662

§ 367. —— INDEPENDENT CONTRACTORS AND THEIR EMPLOYEES.

Where contract provided that buyer of timber should reimburse seller for wages paid scalers, not to exceed $50 per month each, scaler employed by and who worked under direction of seller at salary of $70 per month, was not employee of buyer within act. Kirby Lumber Co. v. McGilberry et al. (Tex.)..... 75

Principal test as to whether one is employee or independent contractor lies in degree of control retained and exercised by person for whom work is being done—where employer of drainage district supervised ditch-cleaning operation as to results only, while person injured operated his own machinery, etc., he was an independent contractor. Meredosia Levee & Drainage Dist. v. Industrial Commission of Illinois et al. (Ill.)..... 24

Contract providing for digging tunnel for express consideration, which gave party desiring tunnel dug right to withhold 20 per centum of compensation until work was completed, but contained no reservation of control of work more than necessary to insure its producing results provided for, did not create relation of master and servant—mere fact that independent contractor followed directions of owner of mine regarding work of digging tunnel did not change relation of master and servant. Industrial Commission of Colorado et al. v. Maryland Casualty Co. (Colo.).. 95

Painter agreeing to paint three smokestacks for corporation was independent contractor where he had absolute control of himself and helper as to time when he was to begin work and as to where he should commence, unhampered by directions from corporation and not subject to its discharge—in relation of employer and employee, employer had control and direction, not only of work and its performance and results, but of its details and methods and may discharge employee disobeying such control—that independent contractor is directed by corporation during performance of work does not affect his status as such—that he was furnished paint and helper by corporation does not affect his status. Litts et al. v. Risley Lumber Co. et al. (N. Y.)..... 170

Claimant for compensation for injuries from town, who engaged in business of stable keeping, teaming and jobbing, let to town for work on roads, cart, horses and himself for undivided price of $6. per day, held "independent contractor." Winslow's Case.. In re Town of Mansfield (Mass.).741

Driver of team hired out by owner, his general employer, to work for another, remains in employ of general employer so far as concerns management and care of horses—owner of teams and horses who let them with drivers at hourly rate, paying drivers and driving team himself, who was injured in management of horses of his team, not entitled to compensation from company or insurer. Centrello's Case. In re J. K. Ryan Co. In re Travelers' Ins. Co. (Mass.)..... 740

One employed to remove trees preparatory to grading street to be paid in lump sum, he furnishing his own tools, controlling his own time, etc., he was a "contractor." Storm v. Thompson (Ia.)..... 470

Where person lets out work to another, and contractee reserves control over work of workmen, method of work, etc., relation of contractor and contractee exists and not that of master and servant. Smith v. State Workmen's Ins. Fund (Pa.)..... 374

Compensation Act must be presumed to have used the word "contractor" in sense it is commonly employed, and in which it has been defined by the courts. Storm v. Thompson (Ia.)..... 470

§ 369. INJURIES OCCURRING IN FOREIGN STATE.

Board obtained jurisdiction by application of wife alleging employment of husband and injury causing death suffered in course of employment, although injury occurred while employee was outside of state. Friedman Mfg. Co. v. Industrial Commission of Illinois et al. (Ill.)..... 21

Compensation Act of Illinois does not authorize compensation for death of person by drowning in Ohio River while at work on occasion attached to river bed outside of state boundary. Union Bridge & Construction Co. v. Industrial Commission et al. (Ill.)..... 690

Where native of New York, employed by New York corporation met death while working for corporation in New Jersey, held, New York act was applicable, it not appearing that it was contemplated that sole activities

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should be in New Jersey. Holmes v. Communipaw Steel Co. et al. (N. Y.) 647
That Compensation Act abolishes certain common-law defenses "within the state" and that the act is made applicable to minors legally employed under laws of this state does not show intention to limit act to injuries within the state—act is part of every contract and in case of injury to employee rights and liabilities must be determined in accordance with its provisions whether injury occurs within or without the state. Anderson v. Miller Scrap Iron Co. et al. (Wis.) 389

§ 371. —— IN GENERAL.

To authorize compensation it is not necessary that injury be one which ought to have been foreseen or expected, but it must be one which, after the event, may be seen to have had its origin in nature of employment. Pekin Cooperage Co. v. Industrial Commission et al. (Ill.) 26
Injury occurs in course of employment when within period of employment, at place where employee may reasonably be and while reasonably fulfilling duties of employment. N. K. Fairbank Co. v. Industrial Commission of Illinois et al. (Ill.) 13
Employee so drunk and helpless that he can no longer follow his employment is not engaged therein and injury received while in such condition does not arise out of employment. Lefens et al. v. Industrial Commission et al. (Ill.) 246
Plaintiff thrown from runway between two buildings was injured in course of employment. Gadberry v. Hutchinson Egg Case Filler Co. (Kan.) 473
In order that injury may arise out of employment it must be received while workman is doing duty he is employed to perform and also as natural incident of work flowing therefrom as natural consequence and directly connected therewith. Di Salvio v. Menihan Co. et al. (N. Y.) 491
Employee, who was in shop in which he worked all ready for day's work at time of accident was injured within course of employment. Rish v. Iowa Portland Cement Co. (Ia.) 463
Injury arising out of employment includes injuries to employees whose services are being performed about premises of employer and at places where employer's business required their presence. Great Lakes Dredge & Dock Co. v. Tetzke et al. (Ind.) 448

§ 372. —— CAUSE OF INJURY IN GENERAL.

Since under statute, compensation is given only for such injuries as are incidental to and grow out of employment, it does not extend to injuries from exposure to hazard which is not peculiar to industry or substantially increased by nature of services. Ellingson Lumber Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.) 215
Where lumberjack by mistake in orders worked at wrong place and on finding mistake went to proper place and worked so much harder than usual in preparing for next day's drive that his feet perspired and were consequently frozen, he received injury proximately caused by accident arising out of and in course of employment within statute. Ellingson Lumber Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.) .. 215
"Personal injury" includes not merely break in some part of body or some wound, but the consequence or disability resulting thereform, such as depressed mental or nervous condition. Kingan & Co., Limited v. Ossam (Ind.) 276
Injury directly and naturally resulting in risk reasonably incident to employment arises out of employment. Thomas v. Proctor & Gamble Mfg. Co. (Kans.) 713

§ 373. —— PARTICULAR CAUSES OF INJURY.

Where claimant, culling barrel staves for barrel raiser, was assulted by employee, who was culling staves for another barrel raiser, because of dispute in regard to one taking staves from rack of other, he suffered accidental injury in course of employment. Pekin Cooperage Co. v. Industrial Commission et al. (Ill.) 26
Where beam tender of tire fabric company, whose business it was to see that yarn was wound around revolving cylinder, was killed when he fell on machine, accident arose out of employment. Dow's Case. In re American Mut. Liability Ins. Co. (Mass.) 144
Injury by freezing is not peculiar to work of lumberjack, so that, in absence of peculiar circumstances, compensation cannot be allowed therefor. Ellingson Lumber Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.) 215
Where sunstroke paralyzed definite portion of employee's brain so that it no longer discharged its proper functions, and death shortly resulted in accordance with ordinary process of such disturbance of brain, employee sustained "personal injury" within the act—death from sunstroke held compensable injury under act—it clearly appearing that employee was stricken while doing what he was employed to do. Injury arose "out of and in the course of employment." Ahern v. Spier et al. (Conn.) 221
Where head walter of hotel was killed, while in hotel eating lunch under contract of employment, by walter whom he had discharged in interests of hotel and acting under its authority, death was in course of employment. Cranney's Case. In re Hotel Essex. In re Employers' Liability Assur. Corporation, Limited (Mass.) 641

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Where coal hauler, engaged on hot day in shoveling coal at place where there was no shade, was stricken with heat or sunstroke and later died, injury was one arising out of employment. Cunningham v. Donovan et al. (Conn.) 584

Attempt to start fire by use of kerosene which he supposed was signal oil did not thereby add to his employment any peril outside thereof, and injury arose out of employment. Benson v. Bush (Kansas)..... 629

Attempt to start fire by use of kerosene which he supposed was signal oil did not thereby add to his employment any peril outside thereof. Benson v. Bush (Kans.)..... 629

Where cap, found by chauffeur in coal pile on dock 200 feet from garage, around which he was working, exploded in chauffeur's attempt to remove attached wire, injuring fellow chauffeur passing by in discharge of duties, fellow chauffeur's injury was result of accident arising out of employment. Laurino v. Donovan et al. (N. Y)..... 499

Employer is liable for injury sustained by employee from electric shock caused by mischievous prank of fellow workmen, when shown that perpetration of such pranks had become custom—person designated by master to direct work of employees is a "foreman," however limited in other respects his authority may be, and knowledge of foreman was knowledge of master. White v. Kansas City Stockyards Co. (Kansas)..... 476

Where workman employed in logging camp was required to sleep in bunk furnished by employer and was injured by straw falling from upper bunk lodging in his throat, injury was incidental to employment. Holt Lumber Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.).. 549

§ 374. —— INJURY AS PROXIMATE CAUSE OF DEATH.

Employee's fall upon machine was proximate cause of death, cause of fall being remote cause only. Dow's Case—In re American Mut. Liability Ins. Co. (Mass.) 144

That employee was not exposed to sunstroke in greater degree than others in same employment and than many other out-of-door workers is immaterial Ahern v. Spier et al. (Conn.)..... 321

Basis of recovery under act is that injury be proximately caused by accident. Print Motorcar Co. v. Industrial Commission of Wisconsin et al. (Wis.).. 399

§ 375. —— SCOPE OF EMPLOYMENT.

It being custom that where deceased, sent to procure samples could not finish his inspection and return to plant before 6 P. M., he would bring samples with him in the morning, injuries received while going home after 7:15 P. M., at which time he left plant of another company after procuring samples did not arise out of and in course of employment, whether or not he was carrying samples when injured. N. K. Fairbank Co. v. Industrial Commission of Illinois et al. (Ill.)..... 18

(1). In general.

Amendment defining "employee" as one in hazardous occupation, does not bring workman injured out of course of employment within Act, in view of section 7, defining injury as one arising out of and in course of employment. Pierson v. Interborough Rapid Transit Co. (N. Y.)..... 186

Where deceased was expected to eat lunch and spend noon hour at factory and to operate elevator when occasion demanded, and he was found crushed between elevator and gate during noon hour, employer was liable for compensation when plant was one included within act in absence of showing suicide. Humphrey et al. v. Industrial Commission of Illinois et al. (Ill.)..... 102

Where superintendent of apartment house was injured by assault committed upon him by tenant of building as result of quarrel arising from insults offered tenant's wife, injury did not occur in line of claimant's duty, assaults being accidents "arising out of employment" only when employee is engaged in master's business. Muller v. H. & A. Cohen, Inc., et al. (N. Y.) ..... 649.

There was evidence that plaintiff, seventeen year old girl, paid by hour, was injured during half hour's intermission at noon while, although at liberty to leave premises, she remained there and after eating her lunch engaged with fellow employes, in accordance with custom known to and approved by employer, in riding truck, finding that accident occured in course of employment was justified. Thomas v. Proctor & Gamble Mfg. Co. (Kan.). 712

Where employee, while driving automobile with which he was not familiar and which was owned by fellow employee who accompanied him on business for his employer, was killed in collision with electric car, no injunction being laid upon them by their employer as to who should operate machine or what kind should be used, he was acting within course of employment. Maryland Casualty Co. et al. v. Industrial Accident Commission et al. (Cal.) 577

That workman at time he receives injury is acting in violation of directions does not preclude injury from arising out of employment. Peru Basket Co. v. Kuntz (Ind.)..... 627

In proceedings for death of waiter, shot while approaching scuffle between another waiter and armed customer, fact that it was waiter's duty to keep order sufficient to sustain award. Stevens et al. v. Industrial Accident Commissin of California et al. (Cal.)..... 572

Servant upon discovering that no chute with which to unload coal had been placed on wagon, went to nearby saloon and telephoned to master's of-

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fice and who was struck by passing automobile while in act of mounting his wagon on his return, injured in course of employment. Consumers' Co. v. Ceislik (Ind.)..... 620
Street flushing motor truck operator who fell in trying to pick up wrench from footboard while manipulating lever was injured in course of employment, though at time of injury one not employee was running truck by his permission. Employers' Liability Assur. Corporation, Limited of London, Eng., et al. v. Industrial Accident Commission et al. (Cal.)..... 421
Had claimant suspended work during working hours to go to cloakroom or wash room and had been injured she could have had an award—it was enough that employee performing act ordinarily incident to working day, though directly beneficial to herself—acquiescence of employer in use of boiler room for employees to heat drinks for lunch sufficient to abrogate rule promulgated long previously prohibiting such use—employee who while on way to floor above slipped and fell at foot of staircase was injured in course of her employment. Etherton v. Johnstown Knitting Mills Co. et al. (N. Y.)..... 361
Employee engaged in marking shoe soles crossed room to bid good-by to fellow employee who had been drafted and while leaning on unguarded cogwheel caught his fingers accident did not arise out of employmeht. Di Salvio v. Menihan Co. et al. (N. Y.)..... 491
That machinist disobeyed master's orders requiring him to remain in pit to repair cars which were racing and in running to car to assist in its repair was run over and killed by another car, does not put accident outside scope of employment. Frint Motorcar Co. v. Industrial Commission of Wisconsin et al (Wis.)..... 399
Where chauffeur employed to drive passenger to certain town reached destination ahead of time and at his suggestion drove passenger around for mutual pleasure and on such pleasure trip was shot by passenger, who suddenly became insane, death did not arise out of employment. Central Garage of La Salle v. Industrial Commission et al. (Ill.)..... 428
Relation of master and servant may extend beyond hours servant is actually required to labor and in some instances to places other than premises where servant is employed—where contract of employment provided that servant should sleep on premises and in bunk furnished by master it was within course of employment for servant to remain upon premises and use bunk furnished for him. Holt Lumber Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.)..... 549

(2). Injury received while going to or from work.

Injury to employee of plumber, engaged in making private connections with city sewers, arises out of employment, where on way to work, at employer's direction, he gets on his truck to get pipe left over at other job and from pipeyard and truck is struck by street car. Scully v. Industrial Commission of Illinois (Ill.)..... 30
Where miner, going to get tools in part of mine where he was told not to go, died from obnoxious gases, he died as result of accident occurring in course of employment. Gurski v. Susquehanna Coal Co. (Pa.)..... 78
Where it is necessary that employee travel public streets in doing work, his place of work includes such public streets as he is required to traverse while doing work—where flour salesman was injured by automobile while crossing street on way to board car to return from home, from which it was customary for him to telephone orders for goods to employer, injury arose out of and in course of employment. Bachman v. Waterman (Ind.)..... 115
Where workman has completed day's work and has left premises and not then engaged in performing any service of employment and meets with accident, he is not within Act. Erickson v. St. Paul City Ry. Co.—O'Malley v. Same (Minn.)..... 154
Respondent's husband resided at Bismark, N. D. He was in employ of relator, whose principal place of business was at Minneapolis. He received salary and traveling expenses, excepting board while at home. His duties to solicit shipment of grain from west of Missouri river to relator for sale on commission. While on way home from field of labor on Sunday morning came to his death by accidental drowning, while attempting to cross Missouri in rowboat. Held that his dependents are entitled to recover compensation under Minnesota Act. State ex rel. McCarthy Bros. Co. v. District Court of Hennepin County et al (Minn.).. 161
Where employee, five minutes after quitting time, after washing, put on coat and hat, and then turned back to look about working room for companions and in doing so put his head into elevator shaft and was killed by descending elevator, accident did not arise out of and in course of employment. Urban v. Topping Bros. et al. (N. Y.)..... 184
Elevated railway guard having two hours off, who stayed on train to ride to office for pay and thence to dentist, injured in collision, was not within Act and could recover in civil action. Pierson v. Interborough Rapid Transit Co. (N. Y.)..... 187
Injury and death of tobacco plantation workers after they had entered into contract of employment, while being driven to place of work in automobile furnished by employer pursuant to employment contract, arose in course of and out of employment. Scalia v. American Sumatra Tobacco Co. et al.—Sala v. Same (Conn.)..... 230
Mechanical engineer, employed on salary with no fixed hours of service, who had been directed to go to another city for information for use in employer's business, and who, on his return after 11:30 P. M., and while

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going from station to home before reporting was killed by automobile, was injured in course of employment. Haddock v. Edgewater Steel Co. et al. (Pa.) 786

Where engineer during vacation, but while in pay of and subject to employer's call, at request of superintendent went to inspect a pumping station to increase his efficiency as employee and was injured in automobile accident, widow entitled to damages for death as injury by injury in course of his employment. Messer v. Manufacturers' Light & Heat Co. et al. (Pa.). 791

Where deceased servant, by crossing bridge under construction to get lunch was violating instruction of employer, injury did not arise out of employment. H. W. Nelson R. Const. Co. v. Industrial Commission et al.. (Ill.) 605

Car inspector on way home to dinner fell from trestle about half a mile from place where he stopped work but within defendant's railroad yards, finding that accident arose out of employment was unwarranted. McInerney v. Buffalo & S. R. Corporation (N. Y.)..... 495

Injuries and death from fall sustained by woman store employee tripping when about to pass through door into store of employer in coming to work, held to have arisen out of employment. Hallett's Case (Mass.).... 481

Where electrician was injured from explosion of dynamite cap while striking match to light cigarette while in shop approaching his work bench to start day's work, injuries arose out of employment, though use of caps was confined to different building and prohibited in shop. Rish v. Iowa Portland Cement Co. (Iowa)..... 463

§ 876. —— NATURE OF INJURY.

(1). In general.

Where employee affected with disease receives personal injury under circumstances entitling him to compensation had no disease been involved, and such disease is materially hastened to final culmination by injury, award may be had if injury resulted from accident—employee afflicted with hernia lifted bale of wire causing intestine to protrude into existing hernial sac, necessitating operation to save life he was entitled to compensation. Puritan Bed Spring Co. v. Wolfe (Ind.)..... 89

§ 880. —— WILLFUL MISCONDUCT OF EMPLOYEE IN GENERAL.

Claimant's refusal to allow amputation of finger was not unreasonable or willful misconduct prejudicing additional compensation, where his physician stated that finger could be saved. Enterprise Fence & Foundry Co. v. Majors (Ind.)..... 113

Claimant's failure to consult physician until two weeks after injury held not to justify denial of all compensation, his conduct not amounting to "willful or serious misconduct" which would possibly justify such denial under one section of statute. Rainey v. Tunnel Coal Co. et al. (Conn)..... 227

That lineman killed by contact with wire was guilty of contributory negligence, or of an infraction of certain rules of employer which were enforced with little or no diligence, would not constitute "willful misconduct." Indianapolis Light & Heat Co. v. Fitzwater (Ind.)..... 284

Death of painter while painting inside of tank car without using respirator because one furnished was defective, held not due to willful misconduct in refusing to use safety appliance.. General American Tank Car Corporation v. Borchardt (Ind.)..... 700

Where employee on master's business was killed in collision with electric car, while driving an automobile, his unfamiliarity with that particular kind of machine constituted negligence only on his part. Maryland Casualty Co. et al. v. Industrial Accident Commission et al. (Cal.)..... 577

Where deceased workman was tapping bolt in sand machine when he fell into machine and was killed, held though he violated instructions, accident cannot be deemed one which did not arise out of employment so as to preclude award. National Car Coupler Co. v. Marr et al. (Ind.).. 466

§ 881. —— INTOXICATION.

Though injury arose out of employment, there can be no award where injury and death were due to intoxication. Great Lakes Dredge & Dock Co.. v. Totzke et al. (Ind.)..... 448

§ 882. —— SATISFACTION OR RELEASE.

Settlement receipt neither filed nor approved by Board does not prevent action by board. Adams v. W. E. Wood Co. et al. (Mich.)..... 311

Where watchman was killed while acting at crossing for both intrastate and interstate carrier, wife executed written release to interstate carrier in consideration of certain amount, release, in so far as any claim under state act was concerned, was invalid as against intrastate carrier, where it did not provide for full compensation in accordance with provisions of act. San Francisco-Oakland Terminal Rys. v. Industrial Accident Commission (Cal.)..... 682

Though receipt and release given at time servant made settlement for injuries did not mention Compensation Act, as employer was operating under act, it must be deemed that settlement was made under act. Wabash Ry. Co. v. Industrial Commission et al. (Ill.)..... 435

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§ 383. ACCIDENT OR INSURANCE FUNDS, AND CONTRIBUTIONS THERETO.

Mere contest by employer of order of Commission for commutation of award of death benefit to widow does not constitute good cause within act empowering Commission to revoke, for good cause shown, its consent for self-insurance. State Industrial Commission v. Yonkers R. Co. (N. Y.). 512

It was improper for Commission, pursuant to previous resolution, to require self-insurer, whose solvency was not questioned to pay into state fund present value of award to widow and children of deceased employee—while law provides that Commission may require agreement on part of any employer to pay award computed under section 27 into special fund or state fund as condition to self-insurance, such consent does not require employer to observe arbitrary and illegal orders of Commission. Sperduto v. New York City Interborough Ry. Co. (N. Y.)..... 502

(B) COMPENSATION.

§ 385. —— DISABILITY BENEFITS.

(1). In general.

Insured employee seeking compensation must submit to operation which will cure him, when so advised by attending physician, when not attended with danger to life or health or extraordinary suffering and he cannot obtain compensation for permanent impairment resulting from such refusal. Enterprise Fence & Foundry Co. v. Majors (Ind.)..... 118

Under Act, life expectancy of claimant, suffering from permanent partial disability is at least proper element for consideration to assist in determining whether he is entitled to full maximum allowance or less sum—Act is to be construed liberally for protection of employee and Commission is restricted as to amount of weekly allowances only by statutory maximum, regardless of aggregate amount awarded. Employers' Mut. Ins. Co. et al. v. Industrial Commission of Colorado et al. (Col.).... 91

Claimant who suffered fracture of base of skull as result of which his sight and hearing were impaired and who suffered from dizziness, headache and general disability, being unable to work at his occupation of mining coal, condition being probably permanent, not inequitable to allow compensation for 25 per cent. disability, to be reduced at any time of proof of improvement. Employers' Mut. Ins. Co. et al. v. Industrial Commission of Colorado et al. (Colo.)..... 91

"Compensation" in connection in which used in Compensation Act means money relief afforded according to scale established and for persons designated and not compensatory damages recoverable in action at law for wrong done or contract broken. Duart v. Simmons (Mass.)..... 136

Where employee lost not only sight of his eye but eye itself, his case would not fall within that part of section 18, making compensation solely for "loss of sight" but within general provision awarding compensation "in all other cases of permanent partial disability." Nelson v. Kentucky River Stone & Sand Co. (Ky.)..... 182

Schedule of compensation for specific injuries may be used by Compensation Board as standard by which to measure compensation to be allowed by injuries not specified but falling within general clause awarding compensation "in all other cases of permanent partial disability." Nelson v. Kentucky River Stone & Sand Co. (Ky.)..... 730

(4). —— Loss of arm, hand, or finger.

Painter who, through laceration of left hand, affecting extensor muscles controlling third and fourth fingers, practically lost use of fingers, though earning capacity was not diminished, did not "lose" fingers within Compensation Act and was entitled to compensation only for difference in earning capacities before and after accident. In re Merchant's Case (Me.)..... 732

Award for loss of arm under act justified by medical testimony that amputation of forearm and wrist, though it had not destroyed use of arm entirely, had taken away a great deal of its function. Stocin v. C. R. Wilson Body Co. et al. (Mich.)..... 763

Loss of more than fourth but less than half of index finger—not entitled to award for loss of half. Tetro v. Superior Printing & Box Co. et al. (N. Y.) 360

(5). Total disability.

Held, where servant who had already lost an arm suffered loss of leg, there was total disability, for employer hiring servant as one able only to do work of one-armed man. Wabash Ry. Co. v. Industrial Commission et al. (Ill.) 435

(6). —— Loss of arm, hand, or finger.

Employee, who had previously lost part of one finger, but nevertheless had use of hand, who, as result of latter injury not resulting in total severance, totally lost use of hand, was entitled to compensation for "total loss of use of hand," though with mechanical appliance on wrist he could perform some manual labor. Mark Mfg. Co. v. Industrial Commission et al. (Ill.)..... 594

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(8). Partial disability.

Injured workman who only in pain and distress and with friendly help of fellow workmen can earn as much as he did before injury may maintain action against employer for permanent partial incapacity. Raffaghelle v. Russell (Kans.) 293

In computing compensation for one partially disabled, average weekly wages that injured servant has been able to earn since injury is factor, but not wages he has been able to earn since injury. Miller v. S. Fair & Sons et al. (Mich.) 752

(10). —— Injury to arm, hand, or finger.

Work of one engaged in what is ordinarily described as common labor is an "employment" within meaning of act, so that servant employed in shoveling, requiring two hands, at time of injury, was not wholly disabled, but was only partially disabled, where he could do other work with one hand. Miller v. S. Fair & Sons (Mich.) 752

(11¼).

Servant, who, with powerful glasses, had vision of one-third with injured right eye, if he closed other eye, so that he could have only one eye and if he used injured eye had but one-third vision was properly awarded compensation for loss of use of right eye. Smith v. F. & B. Const. Co. et al. (N. Y.) 188

Where employee was near-sighted and had only 50 per cent vision lost use of eye, it was not error to allow compensation for loss of eye, as against claim that she had lost only 50 per cent of vision—wages received by empolyee must be considered her wage-earning capacity with defective vision. Hobertis v. Columbia Shirt Co., Inc., et al. (N. Y.) 498

(12). —— Loss of arm, hand, or finger.

Where injury necessitated amputation of arm below elbow resulting in employee's permanent loss of use of his arm, he was entitled to compensation for loss of arm rather than loss of hand under that section which includes all cases of permanent loss of members mentioned therein without regard to point of amputation as well as in case of loss from injury not requiring amputation. Pater v. Superior Steel Co. (Pa.) 793

(15). Temporary disability.

Workman injured in course of employment is not to be denied compensation for such injury and consequent diminished earning capacity merely because injury was not so serious as to totally disable him from labor for first two weeks immediately succeeding accident. Raffaghelle v. Russell (Kansas) 293

Loss of leg—award for period of 133 weeks temporary total incapacity for work was warranted. Moustgaard v. Industrial Commission et al. (Ill.). 600

(16). Expenses of medical or surgical treatment, and nursing.

Where injured employee was furnished physician during week following accident, but after apparent recovery and some months after accident required further medical attention because of tumor resulting from injury, employer was not required to reimburse employee for surgical and hospital expenses in treatment of tumor, such expenses not having been contracted during 30 days immediately following injury—provision construed so that 30-day period commences with actual disability of employee and not with accident, so that, if disability is not concurrent with accident, period does not start until medical attention becomes necessary. John A. Shumaker Co. et al. v. Kendrew (Ind.) 122

(17). Deductions or set-offs, and duty of claimant to reduce loss.

Though stevedore presented claim and accepted compensation under State Compensation Law held that as Commission was without jurisdiction the acceptance of compensation is not bar to libel in admiralty, the payments if made by employer being deductible from recovery and if made by state to be treated as gratuities. Neumann v. Morse Dry Dock & Repair Co., Inc. (U. S.) 567

Allowance for hospital charges and medical attendance of reasonable amount actually incurred by defendant for benefit of workman is proper. Gadberry v. Hutchinson Egg Case Filler Co. (Kan.) 473

Where Fund agreed to pay weekly compensation to servant, who thereafter recovered from physician for malpractice, on petition of Fund, it is not entitled to credit for sum received by servant from physician in reduction of amount due from Fund to claimant under act. Smith v. Battjes Fuel & Building Material Co. et al. (Mich.) 333

(18). —— Submission to surgical operation.

Where condition of total disability was entirely due to original injury, State Fund not entitled to be relieved from weekly payment it had agreed to make during disability on ground that present disability was caused by unskillful treatment or refusal to have operation, Smith v. Batt's Fuel & Building Material Co .et al. (Mich.) 333

(20). Commutation of payments and award of gross sum.

Injured servant, totally disabled permanently, and awarded compensation of $8 a week for his life, was entitled to lump sum settlement if facts

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warranted relief. Karoly v. Industrial Commission of Colorado et al. (Col.) 93
Error assigned on abuse of discretion in award of lump sum judgment instead of periodical and terminable payments to injured workman examined and not sustained. Raffaghelle v. Russell (Kans.(..... 293
Compensation Board might provide by rule that working days shall mean total number of days in period covered according to calendar, less Sundays, legal holidays, half holidays for each week, and days when employee was prevented from working t' rough no fault of his own, to facilitate determination of weekly wage upon which proportionate compensation was based—the law did not give any definite meaning to "working day," but left that as between parties in interest under various circumstances to be determined by Board. Jensen v. Atlantic Refining Co. (Pa.) 657

§ 886. —— DEATH BENEFITS.

(1). In general.

Partially dependent mother of deceased painter, whose average weekly wage amounted to $24, of which he gave her $15, or five-eights of maximum weekly wage for purpose of computing compensation, held entitled to award of $8.25 a week for 300 weeks, with burial expenses. General American Tank Car Corporation v. Borchardt (Ind.)..... 700

(2). Deductions.

In deciding whether parent is wholly or partially dependent on wages of deceased child, expenses incurred by parent on account of child on one side to be weighed against wages received by parent from child on other side and all circumstances are to be considered in reaching conclusion—no deduction can be made on account of expenses for clothing annually incurred on account of child—that father chose to have deceased minor's wages, as well as his own, turned over to his wife as manager of family finances did not diminish his own right to son's wages or his obligation to support family, and he was entitled to entire award as partial dependent; wife not being such also. Dembinski's Case. Appeal of Employers' Liability Assur. Corporation. (Mass.)..... 151
Injured employee's compensation under statute paid pursuant to voluntary agreement with employer cannot be credited, upon employee's death, against compensation awarded dependent. Jackson v Berlin Const. Co. et. al. (Conn.)..... 224
Under act providing that payments other than for necessary medical, surgical or hospital fees shall be deducted from amount payable on death, and section 8 providing that compensation for injury not resulting in death shall include medical, surgical and hospital fees, not to exceed $200., master cannot have the excess over $200 voluntarily paid, credited upon death compensation in absence or agreement therefor. Crescent Coal Co. v. Industrial Commission et al. (Ill.)..... 240

(4). Commutation of payments and award of gross sum.

Industrial Commission cannot direct payment to state insurance fund of present value of future installments of compensation awarded dependent mother of deceased employee, commuted on basis that such award is of value equal to life award, in view of section providing that award to dependent mother is only payable during dependency—basis for commutation fixed by Law providing that commutations shall be upon basis of Suvivorship Annuitants' Table of Mortality and Remarriage Tables of Dutch Royal Insurance Institution, would not apply to award to a mother during her dependency. Bailey v. Columbian Rope Co. et al. (N. Y.)... 176
In computing number of working days to determine workmen's average daily earnings during six months preceding accident under rule of Board providing that "days employee was prevented from working, through no fault of his own," should be deducted, days during which work was suspended on account of labor dispute, together with Sundays and holidays should be deducted—in case of instaneous death period of compensation does not begin until 14 days after death. Rakie v. Jefferson & Clearfield Coal & Iron Co. (Pa.)..... 661
Agreement of employer, as a condition of being allowed to carry its own insurance, to pay, when required, the present value of future payments under award, not applying, when made, to an award of death benefits to widow, no method of estimating contingency of remarriage existing, was not enlarged by subsequent amendment of statute, providing method of estimating present value of such award. State Industrial Commission v. Yonkers R Co.. (N. Y.)..... 513

§ 887. —— DOUBLE COMPENSATION.

Under act workman so injured as to be entitled to compensation may, if disfigured, also have compensation for disfigurement. Wells Bros. Co. v. Industrial Commission et al. (Ill.)..... 255

§ 888. PERSONS ENTITLED TO COMPENSATION FOR DEATH OF EMPLOYEE (DEPENDENTS).

In proceedings by deserted wife and by mistress of deceased, fact that wife was wholly dependent on deceased, and that illegitimate children of

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mistress and deceased were wholly dependent upon him did not necessitate disposal of case under act, as though there were no dependents, on theory that condition was one not contemplated by statute—deserted wife, who had subsequent to her desertion been guilty of adultery, is not a "dependent"—illegitimate children of deceased employee living with decedent and their mother are "dependents" of decedent within the act as part of his family; a "family" being a collective body of persons who live in one house under a head or manager who has legal or moral duty to support. Scott's Case (Me.)..... 49

To entitle parents of deceased to compensation for his death sufficient if he contributed to their support within four years prior to time of injury and they need not have been dependent on him. Humphrey et al. v. Industrial Commission of Illinois et al. (Ill.)..... 102

To entitle parents of deceased employee who died during minority as result of injury caused by employment to compensation it is not necessary that contribution of minor was in excess of expenses or that contrabution to parents had any regularity—it is duty of parents to support minor children until they reach age of majority and minor child "contributes to support of its parents" within the act when it contributes substantial sum to support of family, etc. Metal Stamping Corporation v. Industrial Commission et al. (Ill.)..... 253

Wife can claim support if husband was under legal obligations to support her, although they were not living together at the time and wife was not dependent on him for support. Smith-Lohr Coal Mining Co. v. Industrial Commission et al. (Ill.)..... 250

Dependency of 13 year old daughter of deceased, not presumed to be conclusively dependent, is to be determined as question of fact upon consideration of father's legal obligation under divorce decree ordering payment for her support, or moral obligation, and whether order would be discharged or enforced. Schwartz v. Gerding & Aumann Bros. et al (Ind.)..... 282

Daughter of deceased servant, over 18, married and living with her blind husband, she herself being totally blind and therefore physically incapacitated from earning, was entitled to equal share in death benefit with surviving widow. Gavaghan's Case. In re Employers' Liability Assur. Corporation, Limited (Mass.)..... 643

Father, partially dependent upon wages of son, could participate in compensation allowed, though son left totally dependent widow, father being entitled to part of award proportionate to his part of total contribution to support father and wife made by son. Penn et al. v. Penn. (Ky.)..... 634

Award to widow does not preclude award also to minor children. Wolford v. Geisel Moving & Storage Co. (Pa.)..... 798

"Dependency" means reliance for support upon workman's earnings at time of injury resulting in death and not at any time thereafter. Newton v. Rhode Island Co. (R. I.)..... 527

Word "widow" since it is not defined by act is to be given its ordinary meaning, which is "a married woman whose husband is dead"—although claimant and deceased had lived together for about six years under belief that they were lawfully married, where there was no compliance with statute further than to make out two of three affidavits for license, claimant was not "widow" of deceased within act—though claimant believed she was lawfully married she was not a "dependent." Meton v. State Industrial Insurance Department (Wash.)..... 541

Where deceased workman leaves widow and minor children award should be made in favor of children to begin after award to widow ceases and to continue until each child reaches 16 years of age. Irvin v. William M. Frost & Co. et al. (Pa.)..... 536

Persons in enumerated classes may be wholly or partially dependent and come within contemplation of provisions, if dependency existed at time of injury—one claimed to be dependent must show that contributions were relied upon for living—"support" as applied to "dependency" is broader than food, clothing, etc., and includes all means of living—condition of health of claimant and need for medical attention, etc., are proper subjects for consideration in determining question of dependency. Benjamin F. Shaw Co. v. Palmatory et al. (Del.)..... 42a

Beneficiaries as well as apportionment must be determined by Compensation Act and not statutes governing recovery of damages for wrongful death. Vaughan et al. v. Southern Surety Ins. Co. (Tex.)..... 386

§ 389. SUBROGATION TO RIGHTS OF INJURED EMPLOYEE.

Under section providing for adjustment of compensation where employee is injured by act of third person, the employee, after employer has indemnified himself by suing third person, is entitled to entire balance of judgment recovered if more than sufficient for such indemnification—employer may sue for entire damages either in his own name or that of his employee, or may continue any suit begun in name of such employee after liability is fixed—court may by order distribute proceeds as between employee and employer. Gones v. Fisher (Ill.)..... 526

Compensation Act permits assignment of injured person's right of action against tort-feasor not previously sanctioned by law and provides that making by injured employee of lawful claim under act against employer and latter's insurer shall operate as transfer of legal title to his claim for damages against tort-feasor to employer or latter's insurer—use of word "subrogated" did not render right of action against tort-feasor

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acquired by employer's insurer, which paid claim, an equitable cause of action as against tort-feasor, though as between insurer and employee right of subrogation was equitable right arising out of payment of claim. Massachusetts Bonding & Ins. Co. v. San Francisco-Oakland Terminal Rys. (Cal.) 574
Where dependents of killed employee assigned the cause to insurance carrier, latter could maintain action against wrongdoer. Travelers' Ins. Co. v. Padula Co., Inc. (N. Y.) 339

§ 391. —— PERSONS LIABLE.

Decision of higher state court denying relief under New Jersey Act for drowning in navigable waters not reviewable by national Supreme Court on writ of error. Coon v. Kennedy (U. S.) 403

§ 392. ——AUDIT OF CLAIMS INCURRED OR PAID BY BOARDS OR COMMISSIONS.

(8).

Where assignment or change of interest without endorsement was prohibited and insured's wife inherited and carried on his business after death, company was not liable after she had sent policy to company to be transferred, but before insurer endorsed transfer of interest, even though afterwards insurer accepted balance of earned premiums, where it had no knowledge of injury to servant. Kolb v. Brummer et al. (N. Y.) .. 351

§ 393. ——TERMINATION OF PAYMENTS.

Where one entitled to compensation secured a determination and award for permanent disability and died before lapse of maximum number of payments had been made according to terms of award, right to compensation under award ceased with death. Lahoma Oil Co. et al. v. State Industrial Commission of Oklahoma et al. (Okla.) 192
If award to widow ceases before decedent's children reach 16 years of age, they are entitled to compensation until they reach that age. McCarl et al. v. Borough of Houston (Pa.) 788
In view of fact that no provision is made that remarriage of widow shall excuse further payments where court awarded 300 weeks' compensation, widow's remarriage did not entitle employer to vacation of award. Newton v. Rhode Island Co. (R. I.) 527

§ 393½. ——

Where workman directed by master to one hospital, went to another and was refused care, he was not entitled to award for medical services. Celia v. Industrial Accident Commission et al. (Cal.) 420
Not against public policy, under Compensation Act for employer to agree to pay doctor salary, employer to retain medical fees allowed by insurance association. Sherrill v. Union Lumber Co. (Tex.) 377
Injured servant authorized to select own physician at expense of employer only where latter has neglected or refused to abide—employer under no duty to offer further medical attention, servant having previously consulted physician of own choice. Leadbettor et al. v. Industrial Accident Commission (Cal.) 414

(C) PROCEEDINGS.

§ 394. NATURE AND FORM OF REMEDY.

Procedure for recovery of compensation under act not applicable to cases where suit is to enforce terms of agreement to pay stipulated sums, made after accident. Burns v. Edison (N. J.) 645

§ 395. WHAT LAW GOVERNS.

Test of whether or not locomotive engineer was engaged in interstate commerce when he was injured is that, if accident was incident to interstate work or to whole day's work, partly interstate and partly intrastate, he is engaged in "interstate commerce"—where locomative engineer employed by common carrier, acting under two orders, one to help interstate freight train to summit and other to return with engine, was injured on return trip, he was engaged in "interstate commerce." Callahan v. Boston & M. R. R. (N. H.) 775
Plaintiff, as station agent of defendant, was not, while attempting to start fire in depot stove, engaged in "interstate commerce"—for railroad employee to come under Federal Employers' Liability Act it must appear that injury was incurred while he himself was employed in interstate commerce. Benson v. Bush (Kan.) 629
Test whether railroad employee is engaged in interstate commerce is whether at time of injury he was engaged in interstate transportation or in work so closely related to it as to be practically part of it—work of repairing tracks of interstate railroad is part of interstate commerce. Kusturin v. Chicago & A. R. Co. (Ill.) 693
All controversies touching liability of railroad company engaged in interstate commerce to employees likewise engaged are removed by federal Employers' Liability Act from sphere of state legislation and Commission has no jurisdiction where injury occurred while engaged in interstate

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commerce. Des Moines Union Ry. Co. v. Funk, Industrial Com'r et al. (Iowa) 548
True test as to whether plaintiff was engaged in interstate commerce is: Was he engaged in interstate transportation or in work so closely related to it as to be practically part of it. St. Louis I. M. & S. Ry. Co. v. True. (Okla.) 367
Evidence showing railroad employee was injured while repairing locomotive used in pulling interstate train insufficient to show that rights of parties were controlled by privileges and obligations arising under federal liability Act. Chicago, R. I. & P. Ry. Co. v. Cronin (Okla.) 365
Employee of interstate railway carrier, who is injured while removing snow from track over which interstate trains are being run regularly, is engaged in interstate commerce. Koofos v. Great Northern Ry. Co. (N. D.). 652
Member of switch engine crew, killed in movement of engine, without cars, going from setting one train containing interstate cars, to move another train also containing interstate cars, was engaged in interstate commerce. Wangerow v. Industrial Board et al. (Ill.) 439
Servant was engaged in "interstate commerce" where injury occurred while on way to work which was in interstate commerce, to which he had been regularly assigned and which he had been performing for three weeks. Lindstrom v. New York Cent. R. Co. (N. Y.) 514
Watchman of railroad shops where engines used in interstate commerce were repaired, held not engaged in interstate commerce. Wabash Ry. Co. v. Industrial Commission et al. (Ill.) 435

§ 396. JURISDICTION OF COURTS.

Where insurer brings suit to set aside findings and award of Board, issue to be tried is, not collection of sum of weekly payments due under award, but determination of full amount of insurer's liability that might be recovered, where such amount is in excess of $500 the district court has jurisdiction. Georgia Casualty Co. v. Griesenbeck et ux. (Tex.) 801

§ 397. BOARDS AND COMMISSIONS.

Where claim was not within Act, Commission had no power or authority to approve compensation agreement entered into by employer and employee, pursuant to section 20, or to enforce its execution, since no act or acquiescence could confer jurisdiction on subject-matter. In re Hassen. Appeal of United States Casualty Co. (N. Y.) 181
Board possesses only powers expressly granted, together with those arising from implication because necessary to full exercise of granted powers. Aetna Life Ins Co. v. Shively et al (Ind.) 261
Where servant had written agreement with master and insurer as to payment of award, but parties did not agree as to the time the servant was entitled to such payments, question was proper one for board. Adams v. W E. Wood Co. et al. (Mich.) 311
Industrial Commission being court of limited jurisdiction cannot take cognizance of application for order staying execution of judgment entered on its award brought by one who had not joined in any proceedings before it nor had questioned validity of its award prior to final adjudication and affirmance. Gamble v. Superior Court in and for Alameda County et al. (Cal.) 686
Plaintiff, by appearing before Industrial Commission would not waive his right to object to jurisdiction where commission had no jurisdiction over subject-matter, since parties in such case could not confer jurisdiction even by stipulation. Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al. (Wis.) 671
While Industrial Commission has power to determine whether policy still exists it must determine that question on recognized principles of law. Kold v. Brummer et al. (N. Y.) 351

§ 397½. ——

Provision of Alaska Compensation Law, requiring employer who had been furnished by employee with names and addresses of his beneficiaries to notify them of his death, held to apply to employer which, with other companies, hired men through a common agent who was furnished with such statement. Alaska Treadwell Gold Mining Co. v. Crinis (U. S.) 679
Statute providing that commission may issue subpœnas, compel production of books, etc., contemplates that Commission may require report from employer of accidents. F. Eggers Veneer Seating Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.) 396

§ 398. NOTICE OF INJURY OR CLAIM, AND DEMAND FOR COMPENSATION.

Unauthorized agent acting for employer and insurer cannot waive Sec. 28, requiring claim to be filed with Commission within one year, so as to make waiver binding on parties to proceeding to obtain compensation—employer and insurer were not estopped to set up that Sec. 28, requiring claim to be filed within one year was not complied with, because insurer had paid medical bills for injured employee—injured employee is barred after one year. Twonko v. Rome Brass & Copper Co. et al.—Appeal of American Mut. Compensation Ins. Co. (N. Y.) 57
That employer was represented at inquest showed employer had notice. Sulsberger & Sons Co. v. Industrial Commission of Illinois et al. (Ill.) 88

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"Due notice" to employer of injury to servant being such notice as is required by Act, means a notice given in the manner and to appropriate person specified—injured servant's informal statement in familiar style as to injury received, directed and delivered to assistant foreman, with request that servant's wages be paid to messenger, foreman not being person to whom notice might be given, was not "due notice" to employer. In re Colon. Appeal of American Linoleum Mfg. Co. et al. (N. Y.).... 180
Where agreement between injured servant and insurer has not been filed with and approved by Board, servant cannot after six months from time of injury proceed under Act as amended by section providing that if association and servant fail to agree as to compensation, or disagree as to continuance of payments, either party may notify Board, etc. Courtney's Case (Mass.) 309
Though death of servant did not occur until nearly two years after accident, and he failed to file claim as required, where under act requiring notice within one year after accident, or, if death results, within one year after death, claim of widow of servant filed day after death of husband is within time. O'Esau v. E. W. Bliss Co. et al. (N. Y.)..... 651
Knowledge of employee's injury on part of employer is substitute for written notice and employer must have knowledge within time when written notice should have been given—fact that subscriber did not give notice to its employee that it was insured under act and that he did not have knowledge of insurance until some months subsequent to injury, had no effect on rights in relation to giving notice of injury, or claiming excuse therefrom. Frier's Case (Mass.)..... 638
Injured employee's statement to foreman that he had been hit in eye was insufficient to give foreman knowledge of injury—notice need not give full or exact description; notice that will enable employer to give medical attention, etc., being sufficient—employer's actual knowledge need be only such knowledge of injury as to apprise him of its nature and extent —Statute requiring notice "as soon as practicable" should be given liberal construction so as not to deprive meritorious claimant of compensation —compensation will not be denied on ground of failure to give, or delay in giving, employer notice of injury, where such failure or delay is due to honest mistake and did not prejudice employer—where injury to employee's eye caused impairment of eyesight at time of accident and was not aggravated by failure to receive prompt medical attention employee's failure to give notice without delay was not prejudicial to employer and therefore does not preclude recovery. Bates & Rogers Const. Co. et al. v. Allen (Ky.) 719
To entitle applicant to participate in Compensation Fund he must have filed application with Commissioner within six months after date of death or injury of person on whose account claim is made—neither date of mailing or posting of application nor date when by due course it should have reached Compensation Commissioner can be treated as date of filing, though such delay may have been due to existence of state of war not between the United States and the country in which such application was posted, statute not in terms suspending operation of statute of limitations in such cases. Poccardi, Royal Consul of Italy v. Ott, State Compensation Com'r (W. Va.)..... 547
Making of claim for compensation within six months after accident is essential to right to award—it need not be in writing but may be verbal and it is sufficient if employer is informed by it that employee intends to claim benefit of act. Moustgaard v. Industrial Commission et al. (Ill.). 600
There is distinction between the terms accident and injury as used in Compensation Act. Leadbettor et al. v. Industrial Accident Commission. (Cal.) 414
Notice of injury suffered by watchman at railway shops given to foreman or superintendent is sufficient. Wabash Ry. Co. v. Industrial Commission et al. (Ill.) 435

§ 400. PARTIES.

If claim was within jurisdiction of commission insurance carrier did not need to be party to compensation agreement made pursuant to Sec. 20. In re Hassen. Appeal of United States Casualty Co. (N. Y.)..... 181

§ 401. PLEADING.

That workmen's Law existed in state of Iowa at time of injury is unimportant, it being matter of defense, to be pleaded and its application shown. Nash v. Minneapolis & St. Louis R. Co. (Minn.)..... 157
Where defendant did not plead that either deceased or employer were subject to Compensation Law, court did not err in refusing to allow defendant to introduce testimony in support of defense that plaintiff, deceased's wife, had filed her claim with Commission. Arkansas Valley Ry. Light & Power Co. v. Ballinger (Colo.) 581
Where one of dependents of deceased sought award abandoned second paragraph of its answer setting up willful misconduct defense was waived. National Car Coupler Co. v. Marr et al. (Ind.)..... 456
It is essential in bringing action for personal injuries at common law, that it be made to appear from statement and show by evidence that defendant had elected not to comply with provision of act. Reynolds v. Chicago City Ry. Co. (Ill.) 608
Declaration which in substance alleged that defendant was engaged in electrical work was not defective because it failed to allege that defendant

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had not elected to be governed by act. Vose et al. v. Central Illinois Public Service Co. (Ill.) 613

§ 403. —— PRESUMPTIONS AND BURDEN OF PROOF.

Burden of proving employment and injury is on claimant. Chicago Great Western R. Co. v. Industrial Commission of Illinois et al. (Ill.)..... 14
One claiming compensation had burden of proving injury complained of resulted from accident arising out of employment. New Castle Foundry Co. v. Lysher (Ind.)..... 119
Burden of deceased employee's dependents to prove alleged injury to employee was sustained while he was alive and that death resulted therefrom and that injury arose out of employment. Dow's Case. In re American Mut. Liability Ins. Co. (Mass.)..... 144
Under Act providing that failure to give prescribed notice of injury shall bar claim, unless excused on ground that employer has not been prejudiced thereby, there is a presumption which must be overthrown by claimant of prejudice from want of speedy opportunity to investigate question of accident. Andrews v. Butler Mfg. Co. et al. (N. Y.)..... 173
Burden of showing that employee was guilty of willful misconduct rested upon employer. Indianapolis Light & Heat Co. v. Fitzwater (Ind.)..... 284
Burden to establish claim rests on those seeking award, who may prove their case by circumstantial evidence, as other cases are established. Ginsberg v. Burroughs Adding Mach. Co. (Mich.) 317
Burden rests upon servant to show facts from which conclusion may be properly drawn that injuries arose out of employment Hege & Co. et al. v. Tompkins et al. (Ind.)..... 451
When officer of corporation presents to secretary of state document and secretary of state accepts and files document whereby corporation elects not to come under Compensation Act, public has right to act upon presumption that document was authorized and burden is on corporation to prove that fact. Rickel v. Atchison, T. & S. F. Ry. C. (Kans.)..... 708
Plaintiff seeking compensation has burden of showing injuries arose out of employment. Rish v. Iowa Portland Cement Co. (Ia.)..... 463
Burden on claimant to show that injury arose out of employment. Central Garage of La Salle v. Industrial Commission et al. (Ill.)..... 428
Burden rested on admininstratrix to prove that injury from which death occurred arose out of employment—admininstratrix had burden to establish facts that employee was using way which he had right to use and which is only available way, or as safe as any other. H. W. Nelson R. Const. Co. v. Industrial Commission of Illinois et al. (Ill.) 605
Contention that presumption that person engaged in one of the hazardous occupations enumerated is subject to act, applies only between employer and employee and not against third party, cannot be sustained. Vose et al. v. Central Illinois Public Service Co. (Ill.)..... 612
While dependency may involve principles of law it is a question of fact and burden of proving rests upon him who claims it. Benjamin F. Shaw Co. v. Palmatory et al. (Del.)..... 424
When the employee's body is found on employer's premises at or near regular place of work under circumstances indicating accident during hours of work, it may be fairly inferred that he was injured in course of employment. Flucker v. Carnegie Steel Co. (Pa.)..... 780

§ 404. —— ADMISSIBILITY.

In proceedings to recover for death of employee, killed by falling down stairway, evidence that deceased was habitually intemperate was incompetent, where there was direct testimony that he was sober at time of accident. Lefens et al. v. Industrial Commission et al. (Ill.)..... 246
Report of accident pursuant to rules of practice of Commission is competent evidence in proceeding for compensation. F. Eggers Veneer Seating Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.)..... 296
On issue whether deceased was employee of defendant the pay roll of another company made out by bookkeeper and which deceased did not sign nor see, properly excluded as immaterial. Alaska Treadwell Gold Mining Co. v. Crinis (U. S.) 679
Written report concerning injury of employee made by another employee or manager at request of employer, containing statements regarding accident and injury which shows that statements are those of injured employee and are not admissions of employer, not admissible in evidence for purpose of proving that accident occurred, or of proving nature of injury. Lindsay v. Halstead Milling & Elevator Co. (Kans.)..... 718
Where it had been testified in behalf of employer that servant had wilfully attempted to climb side of moving motor truck, testimony in behalf of servant that another man had been injured about same time that servant was injured, admissible to show that witness of employer was testifying as to other occurrence. F. B. Beasman & Co. et al. v. Butler (Md.)..... 478
Agreement to pay compensation, made after accident, is evidential of occurrence of accident and of right to recover compensation therefor, but not conclusive evidence nor estoppel to disprove accident, if made within year thereafter and in compensation suit it is error to exclude proof in denial of occurrence of accident, simply because of existence of such agreement. Burns v. Edison (N. J.)..... 645
Board not bound by technical rules of court procedure in civil actions, including those relating to hearsay evidence—master's report showing character of injury and that it was within scope of employment admissible

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as statement by party primarily liable, notwithstanding its ex parte character and is not within hearsay rule—master's report must be held voluntary statement by master's adoption of printed portion where not accompanied by other explanation—admission by master in report to Board that servant was injured in particular manner in course of his employment is admissible, though master based such report upon hearsay evidence. Hege & Co. et al. v. Tompkins et al. (Ind.) 451
Under express provisions of Compensation Law, hearsay declarations of decedent admissible to find his death arose out of employment. Employers' Liability Assur. Corporation, Limited, of London, England, v. Industrial Accident Commission. (Cal.) 407
Industrial Commission may consider hearsay evidence, but no material finding can stand, where based entirely on hearsay or incompetent evidence. Garfield Smelting Co. v. Industrial Commission of Utah (Utah) 531
Not error to exclude testimony that plaintiffs had insured their employees and that compensation awarded had been paid by insurance company. Vose et al. v. Central Illinois Public Service Co. (Ill.) 613
Under Law unsworn opinion evidence, given without notice to employer or insurer that it was to be offered to Commission or that it was filed, and without opportunity to interrogate such witness or to make further proof to controvert such evidence, should not be considered by Commission and where it appears the findings and conclusion of Commission was based on such opinion evidence award will be vacated and cause remanded. Flynn v. Ponca City Milling Co. et al. (Okla.) 519

§ 465. —— WEIGHT AND SUFFICIENCY.

(1). In general.

Award of Commission for death of employee under Compensation Act, based on nothing but hearsay evidence as to happening of accident and resulting injury cannot be sustained. Belcher et al. v. Carthage Mach. Co. et al. (N. Y.) 166
Findings of Commission must be supported by evidence and not based upon mere conjecture. Bekkedal Lumber Co. v. Industrial Commission of Wisconsin et al. (Wis.) 212
Burden to establish claim rests on those seeking award, who may prove their case by circumstantial evidence, as other cases are established. Ginsberg v. Burroughs Adding Mach. Co. (Mich.) 317
If inference favorable to applicant can be arrived at by Board only by conjecture or speculation, applicant may not recover and also must fail if there are two or more inferences equally consistent with facts arising from established facts. Ginsberg v. Burroughs Adding Mach. Co. (Mich.) 317
Evidence sustained finding of trial court that accident was not caused by intoxication. State ex rel. London & Lancashire Indemnity Co. of America v. District Court of Hennepin County et al. (Minn.) 337
Where employee with defective eyesight lost part of hand in cutting machine, where he had inadvertently placed it contrary to directions by employer, evidence sustained finding that injury was not result of willful disobedience. Peru Basket Co. v. Kuntz (Ind.) 627
Employer had knowledge within Section 20 that accident had been suffered, though no report had been made. Leadbetter et al. v. Industrial Accident Commission (Cal.) 414
Referee's conclusion as to manner of employee's death may be based on circumstantial evidence. Flucker v. Carnegie Steel Co. (Pa.) 780
Board may draw reasonable inferences from facts and circumstances in evidence. Hege & Co. et al. v. Tompkins et al. Ind.) 451
Agreement to pay compensation, made after accident, is evidential of occurrence of accident and of right to recover compensation therefor, but not conclusive evidence nor estoppel to disprove accident, if made within year thereafter and in compensation suit it is error to exclude proof in denial of occurrence of accident, simply because of existence of such agreement. Burns v. Edison (N. J.) 645

(2). Relation of parties.

Evidence sustained finding that employment of decedent as chauffeur was not casual, though at time of accident he was merely on trial. Marshall Field & Co., v. Industrial Commission of Illinois et al. (Ill.) 105
Evidence sufficient to sustain finding of Board that injured servant was in employ of partnership against which he was proceeding. Scott v. O. A. Hankinson & Co. et al., (Mich.) 759

(4). Injury arising out of and in course of employment.

Evidence sustained award of Industrial Board to employee suffering hernia, injured while lifting bale of wire. Puritan Bed Spring Co. v. Wolfe (Ind.) 89
Where flour salesman, whose duty it was to solicit orders and telephone them to his employer was struck by automobile while crossing street, evidence held to justify finding that he was crossing street in order to solicit from another customer and was still engaged in duties when struck. Bachman v. Waterman (Ind.) 115
Evidence together with proper inferences therefrom, held to sustain finding that injury resulted from accident arising out of and in course of employment. New Castle Foundry Co. v. Lysher (Ind.) 119
Evidence there was no causal connection between injury and tuberculosis

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from which decedent died, held to support decision of Board in favor of insurer. McCarthy's Case (Mass.)..... 141
Member of Board hearing case and full board, were not bound to accept conclusions of medical witnesses as to whether employee was dead when he fell on machine or whether living so that machine caused death—evidence sustained finding of Board that deceased employee was alive when he fell on machine. Dow's Case. In re American Mut. Liability Ins. Co. (Mass.) 144
Evidence held insufficient to show that servant's death from blood clot and pressure on brain was result of any injury received while in course of employment. Hansen et al. v. Turner Const. Co. et al. (N. Y.)..... 168
Evidence sustained judgment that loss of eyesight was caused by accident complained of, and not by pre-existing diseased condition. Nelson v. Industrial Insurance Department (Wash.)..... 199
Evidence sustained finding that employee died from accident arising out of employment and not from injuries intentionally self-inflicted. Bakkedal Lumber Co. v. Industrial Commission of Wisconsin et al. (Wis.)..... 312
In proceeding for compensation for death of employee due to hypostatic pneumonia, evidence sufficient to support finding that death resulted from accident arising out of employment. Bergstrom v. Industrial Commission et al. (Ill.) 232
Fact of injury or death of servant and that it occurred in connection with his employment so as to merit award may be shown by circumstantial evidence—in proceedings for award for death of coal miner, held that there was evidence tending to show that death arose out of employment. Smith-Lohr Coal Mining Co. v. Industrial Commission et al. (Ill.)..... 260
Finding of Board that injury to servant, received while in employment of defendant and for which payments were being made under award, contributed to later injury received while on street car and was aggravated by it, held not unsupported by evidence. Adams v. W. E. Wood Co. et al (Mich.) 311
Where only witness in widow's proceedings for compensation for husband's death, who saw accident, testified falling box only struck husband's toe, but death was caused by blood clot in intestines which originated in thigh, testimony of husband's statements being only evidence that falling box struck thigh, award could not stand. Ginsberg v. Burroughs Adding Mach. Co. (Mich.) 317
Evidence sufficient to sustain finding of Board that injured employee, watchman at one building, had gone to another building of employer, where he was injured by falling down elevator shaft, on business of his own, so that he was not injured in course of employment. Borch v. Simon J. Murphy Co. (Mich.)..... 746
Evidence did not support conclusion of Board that deceased employed as watchman of third, fourth and fifth floors of building and found in dying condition at bottom of elevator shaft, which elevator he had been forbidden to use, was called to shaft by any duty, or was performing duty when he fell. Moyer v. Packard Motorcar Co. (Mich.)..... 756
Evidence warranted finding that death arose out of employment by reason of blood poisoning alleged to have been caused by cut or scratch received by deceased while engaged in cleaning bull gear. McRae v. Morgan & Wright (Mich.) 748
Evidence held sufficient to sustain finding that injury to arm was cause of pneumonia which resulted in death. Ft. Wayne Rolling Mill Corporation v. Buanno et al. (Ind.)..... 626
Where captain of tugboat, after being discharged, returned to boat, ate dinner, and collected his effects, and later his body was found in vicinity of pier at which boat was tied up, evidence insufficient to warrant award against employer. In re Whalen. Whalen v. Stanwood Towing Co. et al. (N. Y.) 510
Evidence showed injury to servant which developed into tuberculosis of bones was one arising in course of employment, fact that servant was predisposed to that affliction not changing result. Wabash Ry. Co. v. Industrial Commission et al. (Ill.)..... 435
Facts surrounding accident held to warrant conclusion that death arose out of employment. Great Lakes Dredge & Dock Co. v. Totzke et al. (Ind.) 448
In proceedings for death of woman store employee, evidence warranted finding of Board that employee fell because she struck her toe or heel against outer edge of top step—if deceased employee had fallen and received injury she did while actively engaged in performance of duties in employer's store and hazard of employment, though cause might rest in conjecture. Hallett's Case. (Mass.)..... 481
Facts proven sufficient to warrant inference that servant watchman, guarding trench where gas was leaking, met his death from asphyxiation while engaged in performing duties assigned by master. Manziano et al. v. Public Service Gas Co. (N. J.) 488
Master liable though no one saw from what source flying piece of board which killed employee came—evidence sufficient to sustain finding that injury in chest caused pneumonia resulting in death. Hanna v. Michigan Steel Castings Co. et al. (Mich.) 322
Award of damages by referee and Board to piano mover's widow approved by court of common pleas on ground that deceased died from abscess brought about by violent exertion and strain and resulting pneumonia, sustained by evidence. Wolford v. Geisel Moving & Storage Co. (Pa.)..... 798

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Evidence sustained finding that accident resulting in death of decedent, traveling man, in driving employer's auto on way home arose in course of employment. State ex rel. London & Lancashire Indemnity Co. of America v. District Court of Hennepin County et al. (Minn.)..... 337
Evidence sustained finding that employee was injured by unexpected dropping of truck into hole causing rupture. Schanning v. Standard Castings Co. et al. (Mich.)..... 331
Rupture caused by jerk and strain was an "accidental injury." Schanning v. Standard Castings Co. et al. (Mich.)..... 331
Statement in employer's report of accident to Commission that elevator operator lost control of car, which fell, and that employee was in car and was injured makes prima facie case in favor of injured employee—testimony of physician sufficient to support conclusion that injury was proximately caused by accident. F. Eggers Veneer Seating Co. et al. v. Industrial Commission of Wisconsin et al (Wis.)..... 396
Unimpeached report of master to Board stating manner of accident and injury to servant and that same is within scope of employment, together with other evidence, sufficient to sustain Board's award. Hege & Co. et al. v. Thompkins et al. (Ind.)..... 451

(5). Dependents.

Evidence examined and found insufficient to sustain finding of plaintiff's partial dependency on their 24 year old son for support. McGarvie et ux. v. Frontenac Coal Co. (Kan.)..... 46
Under evidence mother and youngest brother of deceased were not dependent upon him for support at time of death. Wilkes et al. v. Rome-Wire Co. et al. (N. Y.)..... 174
Evidence that deceased employee paid mother $8 a week when working, which enabled her to run household, consisting of herself, husband, son, daughter and to her children more easily than after she was deprived of son's contribution, legally sufficient to show that mother was partially dependent though husband was alive and not incapacitated. Grant et al. v. Kotwall (Md.)..... 735
Evidence is sufficient to sustain finding that claimant's father and mother were dependent. Benjamin F. Shaw Co. v. Palmatory et al. (Del.).... 424

(6). Compensation.

Evidence held to show that injured employee verbally claimed compensation within six-month period. Moustgaard v. Industrial Commission et al. (Ill.)..... 600

§ 411. —— JUDGMENT OR DECISION.

Special findings that plaintiff's disability is "about 50 per cent" and that he would be able to earn in future "about 50 per cent" of usual wages, are held to be finding of one-half disability and where, in such case, jury by general verdict awards damages of about 63 per cent, judgment should be reduced to recovery of one-half disability. Gadberry v. Hutchinson Egg Case Filler Co. (Kansas)..... 473

§ 412. —— APPEAL OR OTHER PROCEEDING FOR REVIEW.

Where judgment of common pleas court is supported by evidence it is under Statute, conclusive and binding upon questions of fact. Kroog v. Keystone Dairy Co. (N. J.)..... 777
In suit by employers to recover compensation paid for employee's death, due to contact with defendant's high-tension wires, where defendant was engaged in occupation making it subject unless it elected to the contrary, and proof showed that neither plaintiffs nor employee had made any election, judgment will not be reversed because plaintiffs did not prove that they and their employee had elected to be bound by act—where proof showed defendant's wires not sufficiently insulated, admitting coroner's verdict was harmless. Vose et al. v. Central Illinois Public Service Co. (Ill.)..... 613

§ 414. —— IN GENERAL.

Where employer and employee file their written agreement for compensation with board and it is approved, jurisdiction of parties is thereby conferred upon board. Adams v. W. E. Wood Co. et al. (Mich.)..... 311
Proceedings before Commission are not to be hampered by useless formalities or technicalities. F. Eggers Veneer Seating Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.)..... 396

§ 415. RECEPTION OF EVIDENCE.

Though it was improper for Commission to base award on answers by experts to hypothetical question after case was adjourned, and on opinions given by chief medical examiner outside hearing, such error was waived, where on rehearing Commission adverted such evidence and employer and insurance carrier made no objection. Holmes v. Communipaw Steel Co. et al. (N. Y.)..... 647
Statements of adjuster who appeared before Commissioner as representative of both employer and insurer, to obtain, as prescribed by Statute approval of voluntary compensation agreement to effect that deceased had been struck on face with board or plank was properly considered by Commission in making his award. Riccio v. Montano et al. (Conn.)..... 586

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Employer's objection that report of accident which it had made was not formally offered in evidence is not well taken, since employer is fully aware of contents of report—if employer's report is incorrect employer shall call error to attention of Commission upon hearing. F. Eggers Veneer Seating Co. et al. Industrial Commission of Wisconsin et al. (Wis.) 396

§ 416. —— REPORT AND FINDINGS OR AWARD.

Record of claimant on appeal from decision of committee of arbitration to board held to be filed within time required by statute as existing December 4, 1914, where extensions of time had been granted. Sulsberger & Sons Co. v. Industrial Commission of Illinois et al. (Ill.) 33
Agreement for compensation between employee and employer approved by board has effect of award—award not reviewed or set aside, is conclusive on both paties except as provided in Sec. 45, allowing a modification on change of conditions. Pedlow v. Swartz Electric Co. (Ind.) 36
Where question arises as to whether accident from which workman dies occurred in course of employment, findings of fact by compensation referee should be so explicit as to state full circumstances thereof. Gurski v. Susquehanna Coal Co. (Pa.) 73
If injured servant's failure to give notice to employer did not result in prejudice to employer and insurer, Commission before making award should make appropriate findings. In re Colon. Appeal of American Linoleum Mfg. Co. et al. (N. Y.) 180
Board, where appeal has not been taken within ten days, cannot allow appeal nunc pro tunc as of time prior thereto. Wise v. Borough of Cambridge Springs (Pa.) 196
Under act held that if compensation is fixed by commission it is required to determine who is entitled to it before determining the amount. provisions as to distribution by probate court applying only to cases where employer makes voluntary payment to administrator. Smith-Lohr Coal Mining Co v. Industrial Commission et al. (Ill.) 250
Agreement entered into under Act and approved by Board has force and effect of award—in absence of rule of board to contrary, insurance carrier not necessary party to compensation agreement—not binding on insurance carrier, either before or after its approval as against proper proceeding seasonably made, where such agreement is result of mistake or tinctured with fraud—burden is on insurer to show fraud—board may determine fact of fraud and annual order—but where carrier has had reasonable opportunity to be heard on proposition of approval of agreement but has failed to avail itself thereof, its motion to vacate such order should not be entertained unless it clearly excuses failure—before vacating order carrier should be required to make at least an ex parte prima facie case on the merits. Aetna Life Ins. Co. v. Shively et al (Ind.) 261
Act does not require that board serve notice that award has been made and any means ordinarily employed in sending papers, including transmission by mail, express or messenger may be used. Jefferson Hotel Co. v. Young (Ind.) 271
Board has no jurisdiction to review award of full board although hearing was held before less than all the members—that the Act was amended so as to preclude review by full board, although hearing may have been before a less number did not deprive board of jurisdiction to grant rehearing where first hearing was had before amendment—where board on first hearing stated that applicant's injury resulted in total disability to work for certain definite period and then stated that disability "in this proceeding" did not result from his injury, finding was contradictory, and latter finding being general must yield to former specific finding. Kingan & Co., Limited v Ossam (Ind.) 276
Findings of board held contrary to contention of employer appellant, that employee, a lineman, was guilty of willful misconduct. Indianapolis Light & Heat Co. v. Fitzwater. (Ind.) 284
Whether or not statute providing aggrieved party may apply to Industrial Commission for review of award within five days after its date, repealed provision of Code requiring review to be filed within five days of decision, it superseded it as to fixing time to bring review and "date of award" means date of its filing with Commission. Herbig v. Walton Auto Co. et al. (Ia.) 705
Where on review by full Board of award made by one member, appellant made no showing as to what additional testimony sought to be introduced by him would be, but stated only a conclusion, Board did not abuse its discretion in refusing to permit him to introduce additional testimony. Consumers' Co. v. Ceislik (Ind.) 620
Referee in proceedings should make his finding of fact so comprehensive and explicit as to disclose full story of accident but legal precision cannot be insisted upon—act contemplates brevity in matters of practice but if referee fails to pass upon any material matter of fact in evidence which either party considers vital in event of appeal to court, those affected should apply to Compensation Board for assistance on hearing de novo. Flucker v. Carnegie Steel Co. (Pa.) 780
Where insurer failed within seven days after decision of committee of arbitration was filed, to file claim for review Industrial Board had no authority to grant insurer's motion for permission to file late its claim for review. Keohane's Case. In re McCarthy. In re Massachusetts Bonding & Ins. Co. (Mass.) 743

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Mere fact that each finding of referee in proceedings under act is not labeled as finding of fact or conclusion of law in no way changes their actual character and where a series of facts are found showing that employee was injured on employer's premises lack of formality stated conclusion that injury so occurred is not fatal. Dainty v. Jones & Laughlin Steel Co. (Pa.) 784
Nothing in Compensation Act authorizes award to dependent widow to be made upon conditions. Newton v. Rhode Island Co. (R. I.)..... 527

(5).

It must be presumed upon certiorari to board that the board gave due consideration to question of fact in issue. Adams v. W. E. Wood Co. et al (Mich.) 311

§ 417. —— REVIEW BY COURT IN GENERAL.

If evidence in favor of applicant sustains award of commission, weight of evidence to contrary will not be considered by reviewing court—determination of facts upon contradictory evidence by commission is final. Pekin Cooperage Co. v. Industrial Commission et al. (Ill.)..... 26

(1). Nature and form of remedy.

On application for judgment for award and attorney's fees in accordance with statute, court has no jurisdiction to review decision of board, construe statute, or determine whether decision is correct. Friedman Mfg. Co. v. Industrial Commission of Illinois et al. (Ill.)..... 21
Suit by insurer to annul and cancel award of Industrial Accident Board is not strictly speaking, an appeal, and trial is de novo; the effect being similar to that of an appeal from justice court judgment. Georgia Casualty Co. v. Griesenbeck et ux. (Tex.) 801

(3.) —— Certiorari.

Findings of fact by which Commission determines itself clothed with jurisdiction are reviewable by Supreme Court. Miller & Lux Incorporated v. Industrial Accident Commission of California (Cal.) 567
Railroad company against which board of arbitration appointed under Compensation Act had made award in favor of widow of deceased servant, killed in interstate commerce, held entitled to certiorari to test right of Board to act, remedy by appeal after confirmation of award by district court not being plain, speedy or adequate. Des Moines Union Ry. Co. v. Funk, Industrial Com'r, et al. (Iowa) 458

(3½).

Payment of weekly allowance under award by Commission cannot be enjoined pending decision of court on questions involved. Employers' Mut. Ins. Co. et al. v. Industrial Commission of Colorado et al. (Col.)..... 91
Equity has jurisdiction of suit to enjoin successful claimant before Commission from enforcing award by execution or other process—superior court not deprived of jurisdiction to restrain execution of award by Compensation Act. Gamble v. Superior Court in and for Alameda County et al. (Cal.) 686

(3¼). Decisions reviewable.

Whether wife of deceased employee was entitled to award for injuries resulting in death which occurred outside of state involved the construction of Compensation Act, and if construction given by board was erroneous, section 19 permitted review. Friedman Mfg. Co. v. Industrial Commision of Illinois et al. (Ill.)..... 21
Where reasons of appeals do not ask for correction or omission of some specific finding as to a subsidiary fact, or an addition of a material fact, not found, reasons of appeal alleging that evidence was insufficient to warrant commissioner in finding, etc., do not present any assignable reasons of appeal. Rainey v. Tunnel Coal Co. et al. (Conn.)..... 227
Finding of Board upon undisputed facts is finding of law, though it may be styled finding of fact by Board and is reviewable—finding as to whether employee is entitled to compensation as matter of law is reviewable. Bates & Rogers Const. Co. et al. v. Allen (Ky.)..... 719
Whether insurance association, subscribers or agent had notice of injury, whether claim had not been filed as required, whether failure to file was due to mistake or other reasonable cause and whether employee had received injury in course of employment were questions of fact as to which appeal will not lie. In re Pass' Case (Mass.) 738
Findings of referee, affirmed by Board that condition of claimant's hands as result of accident constituted permanent loss of their use was a fact found and not conclusion of law reviewable on appeal. Cartin v. Standard Tin Plate Co. (Pa.) 778
Under act no appeal from award of $40 will lie. Essington et al. v. Bowman (Ind.) 442
Compensation Act does not authorize appeal from order of Board approving or disapproving attorney's fee. Galvin v. Brown (Ind.) 445

(3½).

Under Compensation Law subjecting appeals from determinations of Commission to practice applicable to appeals in civil actions, following death of claimant, awarded compensation, substitution must be had of representative of estate, before appeal by employer and insurer from award

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of Commission to Appellate Division can be heard. Waite v. E. W. Bliss Co. et al. (N. Y.) 509

(3¾). Right of review.

Where notice and copy of decision of board were sent and received by employer on certain day, and no writ of certiorari was sued out or suit in chancery commenced within 20 days thereafter, decision of board became conclusive. Friedman Mfg. Co. v. Industrial Commission of Illinois et al. (Ill.) 21

(3¾). Proceedings for appeal or other form of review.

Act requires that one desiring review of award by full board make application therefor within seven days, regardless of when he received notice—applicant cannot waive provisions of section requiring application for review to be made within that period—board not authorized to extend time for filing application for review beyond period fixed by Act—fact that secretary of Board informed employer that review could not be had would not justify further delay of 21 days in filing an application. Jefferson Hotel Co. v. Young (Ind.) 271

(4.) Presentation and reservations of grounds of review.

Objection that employee was awarded additional compensation by arbitrator for minor operation found necessary because first operation was not wholly successful forfeited his right to compensation, or some part thereof, by refusal to submit to second operation is waived by failure to assign it as ground to review before Industrial Commission. Chicago Steel Foundry Co. v. Industrial Commission et al. (Ill.) 590

Employee's act in going to lunch is incident to employment, though dinner hour is not paid for by employer and injury during such business arises out of employment, rule not applying where employee chooses to go to dangerous place where employment does not necessarily carry him—plaintiff in error cannot complain of incompetency of evidence, first excluded by workmen's compensation arbitrator on her objection, who subsequently brought it out herself on cross-examination of witness without even having made motion to exclude. H. W. Nelson R. Const. Co. v. Industrial Commission of Illinois et al (Ill.) 605

Necessary that party object to hearsay evidence in order to overcome presumption that he consented to admission and consideration. Hege & Co. et al. v. Tompkins et al. (Ind.) 451

(4¾). Record.

Where findings of subsidiary facts on which commissioner based his conclusions stand uncorrected on record they furnish the only basis of facts for testing the correctness of his conclusions—and conclusion that claimant's conduct in not consulting physician until two weeks after injury was not unreasonable was correct when tested by findings of subsidiary facts uncorrected on record—where none of reasons of appeal ask for corrections of any specific finding of subsidiary facts there is no occasion for certified transcript of evidence—on appeal superior court may, by order in nature of writ of certiorari, require the whole or any part of transcript of evidence to be certified up and made part of appeal record. Rainey v. Tunnel Coal Co. et al. (Conn.) 227

(5). Trial or review.

Province of Board to draw inferences from facts proven and on appeal it will be assumed that Board drew those permissible deductions of fact that support award. Bachman v. Waterman (Ind.) 115

Recourse to rights and remedies permitted under federal act—point not having been raised before Commission it will be presumed notice of claim was given. Cimmino v. John T. Clark & Son et al. (N. Y.) 178

On appeal from order of Board denying petition of carrier to set aside order approving agreement on ground of fraud it will be assumed that there was no fraud where there was no finding on that issue, and facts found are not sufficient to force inference of fraud—it will be presumed in absence of finding to contrary that there was no rule of board that hearings regarding approval of agreement be formally set for hearing and that notice be served on carrier. Ætna Life Ins. Co. v. Shivley et al. (Ind.) 261

Contention that imposition of penalty, pursuant to Act upon defendant employers for failure to report accident, is wrong, will not be considered by reviewing court, where order made by board makes no reference to penalty, court being concerned only with orders made by Board. Gaffney v. Goodwillie Bros. (Mich.) 315

On review by full Board of award made by one member, admission of additional evidence was discretionary and action of Board in that regard not subject to review, unless record shows abuse of discretion. Consumers' Co. v. Ceislik (Ind.) 620

(6). —— Questions of law.

Where referee's adjudication contains underlying findings of fact which either negative or fail to support his ultimate findings, error of law is presented which may be reviewed on appeal. Flucker v. Carnegie Steel Co. (Pa.) 780

Whether defendant railway was a common or private carrier under Compensation Act is question of law and appellate court is not bound by

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decision of Industrial Commission. Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al (Wis.) 671

(7). —— Questions of fact.

Where there is some evidence to sustain award it will not be disturbed on appeal. Pedlow v. Swartz Electric Co. (Ind.) 36
The act as amended does not give Appellate Court power to weigh evidence, although member of board who heard evidence found for appellant, and award from which appeal is prosecuted was made by other two members of board—where evidence as to whether refusal to permit operation was such misconduct as to deprive decedent's dependents of benefit of act was clearly open to more than one inference, determination of board cannot be disturbed on appeal—finding as to whether autopsy was necessary to determine cause of death and whether demand therefor was made within reasonable time based on conflicting evidence, will not be disturbed on appeal—there was some evidence to support finding that strangulation of intestines which caused death resulted from hernia, which was caused by strain resulting from master's work. Vonnegut Hardware Co. et al. v. Rose et al. (Ind.) 42
Finding of board as to extent of disability from injury being a legitimate conclusion from facts proved by competent evidence, is conclusive on Supreme Court. Scully v. Industrial Commission of Illinois (Ill.) 30
Findings and award of Commission manifestly supported by competent evidence may not be lawfully overturned on appeal. Employers' Mut. Ins. Co. et al. v. Industrial Commission of Colorado et al. (Col.) 91
It not being contended that any one engaged in the administration of Compensation Act was guilty of fraud or misconduct, findings of fact of Board cannot be reviewed or set aside. Nelson v. Kentucky River Stone & Sand Co. (Ky.) 133
Decisions of Board on questions of fact stand on same footing as verdict of jury or finding of judge and are not subject to review except to determine whether there is any evidence to support them—weight and credibility of testimony as to any causal connection between injury to decedent and tuberculosis which resulted fatally is for Board. McCarthy's Case (Mass.) 141
Findings of Board of all questions of fact are final and cannot be set aside, if there is any evidence to support them—whether deceased servant received injury which caused death and whether injury arose out of employment were questions of fact for Board—where on question whether deceased servant's death was caused by strain of swinging heavy sledge-hammer, thereby injuring and weakening an already diseased heart, or was matter of speculation and conjecture, evidence was conflicting, finding of Board must stand. Weatherbee's Case. In re Massachusetts Bonding & Ins. Co. (Mass.) 147
One question to be decided is whether claimants were dependent on deceased child held, thus showing point was considered and passed on at hearings, such point is open on appeal, though no request was made respecting it. Dembinski's Case. Appeal of Employers' Liability Assur. Corporation (Mass.) 151
If there is any competent evidence fairly tending to support claim reviewing court cannot consider weight of evidence, nor reverse because contrary to preponderance of testimony. Bergstrom v. Industrial Commission et al. (Ill.) 232
As commission has no jurisdiction to apply act to persons not within its provisions, evidence on question of jurisdiction may, contrary to general rule, be reviewed by courts. Thede Bros et al. v. Industrial Commission et al. (Ill.) 242
As to whether employee killed by falling down stairway was intoxicated, is question of fact, in proceedings under act, where evidence is contradictory and will not be reviewed—duty of aribtrator and commission to fairly and impartially consider and weigh all evidence presented and make their findings in accordance with preponderance of evidence and their conclusions on questions of fact are not reviewable. Lefens et al. v. Industrial Commission et al. (Ill.) 246
Where Industrial Commission made award for death of servant courts in their review are restricted to determination whether there is any evidence to show that death arose out of and in course of servant's employment. Smith-Lohr Coal Mining Co. v. Industrial Commission et al (Ill.) 250
Where there was competent evidence tending fairly to prove that deceased employee contributed to support of parents so as to entitle them to compensation under act, the sufficiency of evidence cannot be reviewed—held there was competent evidence to show that deceased who was minor child, had within four years previous to injury contributed to support of parents so as to sustain award. Metal Stampings Corporation v. Industrial Commission et al. (Ill.) 258
Finding in applicant's favor on question of change of condition must be given same effect as verdict of jury or finding of court in ordinarily civil action —where evidence as to whether applicant is suffering from depressed mental condition as result of injuries is conflicting court will not weigh evidence. Kingan & Co., Limited. v. Ossam (Ind.) 276
Where there is evidence which would lead reasonable men to conclude as did the Board on question of daughter's dependency in fact, under Act, Appellate Court is not at liberty to disturb such conclusion. Schwartz v. Gerding & Aumann Bros. et al (Ind.) 282

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Findings of board must be upheld by court on appeal unless unwarranted by evidence and there being substantial evidence sufficient to support facts the same must stand. Indianapolis Light & Heat Co. v. Fitzwater (Ind.) 384

That reviewing court is satisfied that it would not reach conclusion reached by Board is not conclusive in determining whether there is testimony supporting finding and conclusion of Board—disputed question being whether accident caused employee's illness and death, award will not be set aside by reviewing court, where, although testimony cannot be harmonized, there is ground for saying that Board had before it some evidence tending to prove that accident set up train of physical disturbance, affecting an existing pathological condition in such a way as to cause death. Gaffney v. Goodwille Bros. (Mich.) 315

Board is trier of facts and weighs conflicting testimony medical as well as lay, having province to draw legitimate inferences from established facts and to weigh probabilities from them, though inferences must be from established facts, an inference may not be built upon inference. Ginsberg v. Burroughs Adding Mach. Co. (Mich.)..... 317

Where referee found deceased reached piece of work in time to resume work during regular working hours conclusion of fact as to manner of death was for compensation authorities, and when made by referee and affirmed by Board not reversible by court—as act defines "injury by accident in course of employment" question of law is whether underlying findings of fact are sufficient to bring case within such definition, but that does not warrant court's interference—where tribunal charged with finding facts has considered all attending circumstances as against presumptions arising out of other facts favoring claimant, controlling finding that employee was killed in particular manner, reasonably indicated by circumstances found cannot be reversed. Flucker v. Carnegie Steel Co. (Pa.) 780

Question whether workman is injured by accident arising out of employment may be question of law or one primarily of fact or mixed question of law and fact. Borck v. Simon J. Murphy Co. (Mich.) 746

Findings of fact of Board stand if there is any evidence to support them and Board was at liberty so far as review is concerned to refuse to give credit to any part of evidence not, in their opinion, entitled to credit. In re Pass' Case (Mass.) 738

In considering whether findings reported by referee are sufficient to bring case within term "course of employment" court will keep in mind the liberal construction placed on such statutory definition and power of compensation authorities to find facts from direct proof, circumstantial evidence or inference. Haddock v. Edgewater Steel Co. et al. (Pa.)..... 786

Supreme court may review ultimate or controlling findings of referee of Board when material underlying facts indicate the character of evidence upon which ultimate or controlling findings rest. Wolford v. Geisel Moving & Storage Co. (Pa.) 798

Finding of Board on question of fact is final, unless there was no competent evidence from which fact might have been found. Scott v. O. A. Hankinson & Co. et al. (Mich.) 759

Findings of Board upon disputed facts are not reviewable. Bates & Rogers Const. Co. et al. v. Allen (Ky.) 719

Findings of fact by Commission on conflicting evidence are conclusive on courts. San Francisco-Oakland Terminal Rys. v. Industrial Accident Commission (Cal.) 682

Finding of referee adopted by Board is absolutely conclusive upon Supreme Court. Messer v. Manufacturers' Light & Heat Co. et al. (Pa.)..... 791

Where it cannot be said that finding of Board that subscriber or agent did not have knowledge of injury to employee as soon as practicable after occurrence was not warranted as matter of law, it must stand on appeal from decree of superior court affirming denial of compensation. Frier's Case. (Mass.) 638

Finding of Commission that death of employee had resulted from injuries, when supported by evidence is conclusive on courts. Holmes v. Communipaw Steel Co. et al. (N. Y.) 647

Whether physical ailments of female employee had any causal connection with fall from swivel chair in which she was sitting in course of employment was question of fact, decision of which was wholly for Board, whose conclusion cannot be reversed. Berman's Case. In re Gulf Refining Co. In re Travelers' Ins. Co. (Mass.)..... 640

If there is in the record any competent evidence upon which finding of Commission can be based, Supreme Court will not weigh it—held competent evidence tending to sustain finding that injury arose out of employment. Chicago Steel Foundry Co. v. Industrial Commission et al. (Ill.)..... 590

Where evidence is conflicting and tends to support conclusion reached by Board, Appellee Court will not disturb its finding. Indiana Car & Equipment Co. v. Celetto (Ind.)..... 624

Province of Board to weigh evidence and draw inferences. Schanning v. Standard Castings Co. et al. (Mich.) 331

Province of Board to consider testimony and give it such weight as in its judgment is proper. Great Lakes Dredge & Dock Co. v. Totzke et al. (Ind.) 448

Courts cannot review finding of fact of referee and Board. McCarl et al. v. Borough of Houston (Pa.) 788

Where referee and compensation board, after considering all circumstances, concluded that deceased had neither been discharged nor quit his job,

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it was reversible error for court to set aside such decision. Dainty v. Jones & Laughlin Steel Co. (Pa.) 784
It is the exclusive province of Board to weigh evidence and determine therefrom in first instance whether injury arose out of employment—evidence as to manner in which employee was injured held such as to permit difference of opinion so that findings would not be disturbed—where evidence as to nature of injury would permit affirmative or negative finding court on appeal must uphold conclusion of Board. Ansted Spring & Axle Co. v. Ayres (Ind.) 444
Whether servant employed in United States Military cantonment while on way from sleeping quarters, provided by contractor, was injured in course of employment was for jury—whether day-laborer engaged in cutting, piling, and burning brush, etc., was engaged in "extrahazardous employment" and whether he was guilty of "willful misconduct" in effort to climb on side of motor truck while moving was for jury. F. B. Beasman & Co. et al. v. Butler (Md.) 478
Finding of facts by Board stands on same footing as finding of trial court or verdict of jury and when sustained by competent evidence is binding on appellate court. Hege & Co. et al. v. Tompkins et al. (Ind.)..... 451
Where Commission had power to hold hearing, take evidence, etc., its findings, though erroneous, are binding on Court of Appeal, court's only power being in case where Commission exceeds its authority. Crosardo et al. v. Industrial Accident Commission et al. (Cal.) 419
Supreme Court does not concern itself with determination of questions of fact when there is any competent testimony supporting conclusions of Board. Smith v. Battjes Fuel & Building Material Co. et al. (Mich.). 333
Board like jury may draw reasonable inferences from facts and circumstances, and finding by Board stands upon same footing as finding of trial court or verdict of jury and when sustained by competent evidence is binding on court on appeal. Consumers' Co. v. Celsilk (Ind.)..... 620
Where trial court concluded upon basis of rational inference, tantamount to legal proof, that servant's death arose out of employment, section of act requires an affirmance of judgment. Manziano et al. v. Public Service Gas Co. (N. J.) 488

(8). —— Harmless error.

If claim of injured servant for payment in lump sum was denied on erroneous theory as to power of Commission to order such payments in cases of permanent total disability, claimant was prejudiced though Commission also denied application for lump settlement on ground that it would not be for best interests of parties. Karoly v. Industrial Commission of Colorado et al. (Col.)..... 98
Admission of incompetent evidence by Industrial Board will not operate to reverse its award, where there is any competent evidence to support it. Kingan & Co., Limited v. Ossam (Ind.)..... 276
Supreme Court should not reverse award of compensation for admission of hearsay evidence, if there is competent evidence to sustain board's finding Ginsberg v. Burroughs Adding Mach. Co. (Mich.)..... 317
Mere fact that incompetent evidence is heard is no cause for reversal where there was some competent evidence which tended to establish every material fact—Board awarded compensation for maximum period of 500 weeks instead of 300 weeks, as asked by claimant, does not afford ground for reversal, duration being limited as law provides and appellant not having shown that its rights were in any way prejudiced. Consumers' Co. v. Celsilk (Ind.)..... 620
Supreme Court will not interfere with award of Board if there was any competent testimony upon which to base award, though improper evidence admitted. Hanna v. Michigan Steel Castings Co. et al. (Mich.) 322
Admission of incompetent evidency Industrial Board will not operate to reverse award if there be any basis to support it. Hege & Co. et al. v. Tompkins et al. (Ind.) 451

(9). Determination and disposition of cause.

Where board finds facts additional to those stated by referee and their correctness is conceded, Supreme Court may determine the issue upon facts so found. Gurski v. Susquehanna Coal Co. (Pa.)..... 73
If Board improperly allows appeal from decision of referee and affirms decision, Common Pleas Court has not jurisdiction upon appeal to reverse referee's decision and dismiss claim. Wise v. Borough of Cambridge Springs (Pa.)..... 196
Under law unsworn opinion evidence, given without notice to employer or insurer that it was to be offered to Commission or that it was filed, and without opportunity to interrogate such witness or to make further proof to controvert such evidence, should not be considered by Commission and where it appears the findings and conclusion of Commission was based such opinion evidence award will be vacated and cause remanded. Flynn v. Ponca City Milling Co. et al. (Okla.)..... 519
Where record indicated that evidence could be procured to show average annual earning capacity of claimant's decedent or that of workman of same class in same locality, but claimant failed to make proof, it was error to apply 300-day rule, taking account only of wages of claimant's decedent received at time he was injured and for 6 weeks prior thereto. Campbell v. Cummer-Diggins Co. (Mich.) 750

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District court may confirm or set aside order of Commissioner if he finds Commissioner has committed error in one or more of the particulars designated by Statute. Herbig v. Walton Auto Co. et al. (Ia.) 705
Where appeal from allowance of attorney's fees is unauthorized Appellate Court will dismiss appeal, though appellee has not raised question. Galvin v. Brown (Ind.) 445
Exact degree of impairment to claimant's eye not being shown by evidence fact that Board left permanent impairment of vision open for consideration is not cause for reversal. Consumers' Co. v. Ceislik (Ind.)..... 620

§ 418. —— REVIEW OF JUDGMENT OF COURT ENTERED ON AWARD OF BOARD OR COMMISSION.

(2). Decision reviewable.

Compensation Act requires final decree of superior court from which party aggrieved can appeal to Supreme Judicial Court—mandatory order of superior court that proceedings be remitted to Board for entrance of finding that Board had no jurisdiction and for dismissal of claim not contemplated by act and to be treated as interlocutory and not as final order from which employee's administratrix could appeal—Board had no jurisdiction and Board so found and dismissed claim and superior court entered final decree—case is properly before Supreme Judicial Court on employee's administratrix's appeal from superior court. Keohane's Case. In re McCarthy. In re Massachusetts Bonding & Ins. Co. (Mass.) 743

(3). Presentation and reservation of grounds of review.

Where counsel for insurer stated before board that he did not wish to raise any question as to giving of notice of injury, insurer cannot contend for first time in Supreme Judicial Court on appeal that notice was insufficient. Mallory's Case (Mass.)..... 55
Objection that employee made no claim for compensation within six months after accident cannot be raised for first time in Supreme Court on review of judgment of circuit court affirming award—where court affirms such award, employer cannot claim that objection, that employee had made no claim for compensation within six months of accident was raised in court below, merely by showing award was attacked below as being "contrary to law" and "contrary to facts." Storrs v. Industrial Commission et al. (Ill.)..... 238
On writ of error to review judgment confirming award employer cannot attack basis of award on ground not presented before commission or trial court. Wells Bros. Co v. Industrial Commission et al. (Ill.) 255
Though application that district court render "decree" in accordance with decision of Industrial Commissioner, decision was not chancery decree, reviewable de novo and no relief can be had on appeal in absence of exception. Keys v. American Brick & Tile Co. (Ia.) 468

(3½).

Writ of error to review action of circuit court in confirming award of Board by judgment rendered December 11, 1917 was sued out in time, though record was not filed until April, 1918, term, complaining party in absence of provision in Compensation Act having three years after rendition of judgment under Practice Act. Western Electric Co. v. Industrial Commission of Illinois et al. (Ill.)..... 107
In action to set aside award of Commission appeal of employer and insurer from judgment confirming award must be dismissed, where notice of appeal was served on Attorney General, appearing for Commission under Statute, and clerk of court, but not on claimants who are "adverse parties," on whom service should be made. Frontier Mining Co. et al. v. Industrial Commission of Wisconsin et al. (Wis.)..... 217
Where Board found that death was accidental and there was competent
Where attorney for servant's widow presented to Supreme Court copies of pertinent papers on file with board, stating he wished to appeal to Supreme Judicial Court from decision of board, there was no appeal to Supreme Judicial Court. Compensation Act providing appeal only from decree of superior court—mere filing of objections to entry of decree confirming order of board did not act as appeal from decree of court to Supreme Judicial Court—where objections to entry of decree confirming finding of board were made, judge of superior court, by noting that he regarded attorney as taking appeal from decree could not convert objections into appeal. Martin's Case—In re Employers' Liability Assur. Corporation, Ltd. (Mass.) 308

(4). Record.

On appeal from action of district court affirming finding of Commissioner, appellant is not entitled to any relief, where under abstract for appellee, which has not been met by certification, it appears that record was not lodged in district court in such manner under statute as to give it power to proceed. Keys et ux. v. American Brick & Tile Co. (Ia.) 468

(5). Review.

Where servant claimed total disability and the only evidence showed such disability, employer could not complain that award for partial disability was excessive. Wells Bros. Co. v. Industrial Commission et al. (Ill.) .. 255
Court on appeal from judgment affirming award of Commission having

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findings of specific circumstances which gave rise to accident, these, rather than general conclusions drawn from them by Industrial Commission are to control. McInerney v. Buffalo & S. R. Corporation (N. Y.) 494

(6). —— Questions of law or fact.

Evidence sufficient to preclude reversal on appeal from decision of circuit court sustaining award. Sulzberger & Sons Co. v. Industrial Commission of Illinois et al. (Ill.) 33

On appeal from decree of superior court affirming award, Supreme Judicial Court is not concerned with weight of evidence or credibility of witness and findings of fact in report of single member of board, which were affirmed on review, must stand, unless plainly unwarranted—widow not being bound by insurer's evidence and having presented evidence warranting finding that blow was sufficient to cause conditions found to exist on autopsy, and which caused death, court cannot say as matter of law that conclusion that injury was cause of death, was error. Mallory's Case (Mass.) 55

evidence in record to support such finding, Supreme Court on error to review judgment of circuit court confirming Board's award will not weigh evidence and will affirm judgment. Western Electric Co. v. Industrial Commission of Illinois et al. (Ill.) 107

In trial of common-law case before jury, where there is no dispute as to facts, question of decision is one for court and not for jury, same rule is applicable to compensation cases. Bates & Rogers Const. Co. et al. v. Allen (Ky.) 719

§ 419. PROCEEDINGS TO INCREASE, DIMINISH, OR TERMINATE COMPENSATION.

In hearing under Sec. 45 to review award because of changed conditions, parties are bound by proof made at former trial, and proofs limited to evidence the proof to prove or disprove contention that conditions existing at time of award have changed. Pedlow v. Swartz Electric Co. (Ind.) 36

The Commission, not only has right to retain jurisdiction of proceeding to obtain compensation for further action and award, but such is its legal duty where extent of claimant's disabilities cannot be immediately ascertained. Employers' Mut. Ins. Co. et al. v. Industrial Commission of Colorado et al. (Col.) 91

Where compensation for loss of employee's finger has been awarded by Board, award may be modified and increased upon showing that employee's use of hand because of infection had been permanently impaired. Enterprise Fence & Foundry Co. v. Majors (Ind.) 113

Voluntary payments, by master as provided by act which were accepted by servant, held a "settlement" referred to in statute, hence on recurrence of disability servant might within 18 months, petition for further compensation—finding of board that injury had recurred if based upon legitimate conclusion from facts proven cannot be reviewed—finding that injury for which servant had already received compensation had recurred, held to have sufficient support in evidence so that matter could not be reviewed—where evidence on petition by servant for further compensation on ground of recurrence would have supported finding of total disability, master cannot complain of finding of partial disability Carson-Payson Co. v. Industrial Commission et al. (Ill.) 234

In proceeding to recover for injury resulting in traumatic hysteria, evidence sustained finding that disability as result of injury had recurred and that he was totally disabled. Kingan & Co., Limited, v. Ossam (Ind.) 276

Where board reopened case for consideration on merits to which defendants, employer and insurer did not then object, but took part in proceedings and defendants do not appear to have asked to reopen case, or to have further proofs, their later objection to reopening is without merit. Adams v. W. E. Wood Co et al. (Mich.) 311

Where employer participated without raising objection that notice was not given, matter not having been raised before Industrial Commission, employer having submitted to its jurisdiction, it cannot be raised thereafter—where employer did not raise objection that claimant was suffering from continuance of original disability, objection cannot be raised. Meyeret al. v. Industrial Commission et al (Ill.) 603

Settlement made between master and servant held one contemplated by Compensation Act, so petition to review on account of recurrence of injury might be filed within eighteen months. Wabash Ry. Co. v. Industrial Commission et al. (Ill.) 435

§ 420. COSTS, FEES, AND EXPENSES.

Where employer failed to pay compensation according to award and did not institute proceedings for review within 20 days, as provided by act, circuit court on claimant's application for judgment for award properly allowed attorney's fees. Friedman Mfg. Co. v. Industrial Commission of Illinois et al. (Ill.) 21

Fact that insurer did not pay deceased employee's beneficiaries in Scotland and insisted on appointment of administrator was not inconsistent with existence of some estate to be administered on death of employee and so not sufficient to bring appointment of administrator within Compensation-

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Act, as to expenses of appointment of a "not otherwise necessary" legal representative. Mellon's Case (Mass.) 143
Duty placed upon insurer by Act to pay for legal services in connection with appointment of duties of legal representation of deceased employee not otherwise necessary, is limited to necessary disbursements for appointment, representative's necessary expenses and compensation for time necessarily spent in carrying out provision that, if payment is made to him, it shall be paid to dependents. Mellon's Case (Mass.) 143
Allowance of $45. to expert medical witness was not justified. Nelson v. Industrial Insurance Department (Wash.) 199
Approval of Industrial Board is essential to validity of agreements between injured servants or their dependents and their attorneys—proceedings to fix amount of fees of claimant's attorneys in special statutory proceeding and exercise of police power and neither Board nor court upon certiorari can enter judgment for return of excess fee taken under alleged contract over that approved by Board. May v. Charles Hoertz & Son et al. (Mich.) 484

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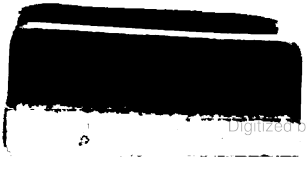

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